THE

JUSTICE OF THE PEACE,

AND

PARISH OFFICER.

By RICHARD BURN, LL. D.

LATE CHANCELLOR OF THE DIOCESE OF CARLISLE.

CONTINUED TO THE PRESENT TIME

By JOHN BURN, Esq. his Son,

ONE OF HIS MAJESTY'S JUSTICES OF THE PEACE FOR THE COUNTIES OF WESTMORLAND AND CUMBERLAND.

THE EIGHTEENTH EDITION:

REVISED AND CORRECTED.

IN FOUR VOLUMES.

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PREFACE

TO THE

FIRST EDITION.

THE author propoſeth in this book to render the laws relating to the ſubjects it treats of, a little more intelligible than hath hitherto been done.

The method he makes uſe of is various.

The firſt thing regarded is the order of *time*. Thus in the Poor Laws; firſt is ſet forth the appointment of *overſeers*; next the ſeveral branches of their duty, in finding *ſettlements* for the poor——in removing them to ſuch ſettlements——in making *rates* for their relief——in *relieving* and otherwiſe ordering them——and laſt of all, in *accounting* at the expiration of their office.——Then again, in treating of *ſettlements*, it occurs to conſider diſtinctly, and as near to the ſaid order as may be, ten different kinds of ſettlements——by *birth*——by the *parents* ſettlement——by *apprenticeſhip*——by *ſervice*——by *marriage*——by *inhabiting forty days after notice*——by paying *pariſh rates*——by ſerving a *pariſh office*——by *renting* 10l. *a year*——and by a perſon's *own eſtate*.——In like manner, in treating of the *rates*, firſt is ſet forth the courſe of *laying the aſſeſſment*——then the allowance thereof by the juſtices——*publiſhing* the ſame in the church——*appeal* againſt the rates at the ſeſſions——levying the ſame

by *diſtreſs*——and finally, *commitment* where no diſtreſs can be had.

Thus to exhibit another inſtance——In the article of the *Woollen manufacture*, which makes up a conſiderable part of the juſtice of the peace his duty, and of the officers ſubordinate to him, there is ſuch a number and variety of ſtatutes, that authors are generally overwhelmed with them. To avoid which perplexity, the laws are here digeſted in order, according to the natural progreſs of that buſineſs; from the ſhearing of the ſheep, to the exportation of the wool manufactured; under the ſeveral heads of *winding of wool* by the ſhearer——laws to prevent its *exportation*——*working* of cloth——*fulling*——*meaſuring*——*dying*——*ſtretching*——*dreſſing*——*exporting*.

Where there is no priority in point of time; the next method is that of Lord *Coke*, to frame a definition which takes in the whole ſubject, and then explain the ſeveral parts of ſuch definition in their order. Thus *Grand larceny* is defined to be, *A felonious and fraudulent taking and carrying away by any perſon of the mere perſonal goods of another, above the value of* 12*d*. In the handling of which, the ſeveral branches of the definition are explained in the order as they ſtand; *viz. A felonious and fraudulent taking*——*and carrying away*——*by any perſon*——*of the mere perſonal goods*——*of another*——*above the value of* 12*d*. Under which heads the general learning relating to that whole title is comprehended.

The like method is purſued in treating of the *commiſſion of the peace*, the form of an *indictment*, the form of an *order of removal*, and other articles.

In

In general, it is provided, that one thing ſhall clear the way for another, and the ſubſequent paragraphs explain the preceding.

Under the influence of which conduct, the author hath attempted to bring together under one general title, divers articles relating to the ſame ſubject, which in the common books are broken and detached under various ſeparate titles; hoping thereby, that what hath hitherto been thought introductory of confuſion, may tend to render the ſubject more perſpicuous, in exhibiting the whole under one comprehenſive view. Thus the laws relating to the *game*, which are above forty in number, and are interſperſed in the common books under about thirteen different titles, are here digeſted under one general title, *Game*, to which the reader ſhall have recourſe for the knowledge of whatſoever belongeth to that ſubject. For example, if any perſon would be ſatisfied, what penalty the law hath provided for *tracing hares in the ſnow*; by recurring to the general title concerning the game, he will find the game diſtinguiſhed into three kinds, the *four-footed* game, the *winged* game, and the game of *fiſh*: The *four-footed* game are diſtributed into the ſeveral ſpecies of *deer*, *hares*, and *conies*; under which head concerning *hares*, he will readily find what is deſired. In like manner, the *winged* game are ſubdivided into ſeveral branches, concerning *hawks* and *hawking* ——*ſwans*——*partridges and pheaſants*——*pigeons*—— *wild ducks*, *wild geeſe*, *and other water fowl*——*grouſe or moor game*——*herons*——and *other fowl*; each of which have their peculiar laws.

In theſe large comprehenſive titles, care is likewiſe taken, to be as particular as may be without injuring the connection in the ſtatutes, by inſerting the whole law by itſelf, relating to each ſeparate article. The benefit of which will appear by the following

following inſtance: If a perſon would know, what number of horſes or beaſts in a cart or waggon are allowed by the ſtatutes for the preſervation of the roads; let him take what treatiſe at preſent he pleaſes concerning the highways, he muſt read over the whole, before he ſhall be ſure that he hath found all which the law hath enacted concerning the ſame; and ſuch is often the inaccuracy and confuſion, that when he hath peruſed the whole, perhaps he may be ſtill to ſeek. For as to this inſtance before us, there have been regulations made concerning the ſame, by ten different acts of parliament, at very different times. Before he can have any competent knowledge thereof, he muſt lay all theſe ten acts together; and when he ſhall have done this, he will find amongſt them ſo many repeals and revivals, and explanations, and amendments, that it will even then be no eaſy matter to conclude with certainty how the law doth ſtand as to that article. To ſpare the reader all which trouble, the author hath in this, and all other the like inſtances, laid the whole law together relating thereunto, or at leaſt all that hath occurred to him, or which he hath thought it material to inſert. So that the reader may receive ſatisfaction in a very ſmall compaſs, as to what he ſhall be inquiring about; or at leaſt he may be ſatisfied in this, that if he doth not find it there, he need not ſeek for it elſewhere in the book *.

And by this method of bringing together into one general title, all thoſe ſeparate diſtinct titles, which have a mutual relation to and dependance upon each other, the author hath avoided one great inconvenience, of referring the reader from one title to another, and from that other back

* At preſent theſe acts are reduced into two general acts, one for turnpike roads, the other for highways not being turnpike.

again

again to the firſt, and (which is not unuſual in books of the like kind) perhaps loſing the thing to be treated of betwixt them.

Upon which account alſo, where one law occurreth under two different titles, it is uſual with him to inſert the ſame under both thoſe titles; ſo that the reader's attention may not be interrupted, by ſending him to ſearch other titles, and from thoſe perhaps others again, which have no principal relation to the matter he hath in hand.

Alſo upon another account, he hath ſometimes made uſe of more words than otherwiſe he would have done, namely to avoid the frequent repetition of the term, *&c.* which is a vague expreſſion, and apt to create an uneaſineſs in the reader's mind, for that he cannot be ſatisfied from thence, how much, or how little is intended to be underſtood.

He hath alſo been ſomewhat large in the matter of *precedents* under divers titles; and hath endeavoured to bring them much nearer to the ſtatutes, upon which they ought to be formed, than uſually hath been done.

For all which enlargements, he hath the more ſpace allowed to him, for that he hath not thought it neceſſary (as others have done) to take up near one fourth part of the book, by inſerting *Blackerby*'s juſtice at the end of it, by way of index; hoping that the method he hath purſued will render every thing of that kind impertinent and uſeleſs.

THE MATERIALS which the author hath made uſe of, are chiefly of four kinds—The *ſtatutes* at large—the ſeveral treatiſes concerning the *pleas of the crown*—the *reports* of caſes adjudged in the court

court of king's bench—and the books concerning the *office of a juſtice of the peace.*

As to the *ſtatutes* at large, or acts of parliament; the author hath not thought himſelf at liberty, as Mr. *Dalton* and others have done, to deliver the import thereof in his own words; but hath conſtantly abridged the act in the words of the act itſelf, leaving out nothing which may ſeem any way material. And to each diſtinct clauſe, he hath annexed the interpretation thereof, where the ſame hath been determined in the court of king's bench, or expounded by other good authority.

The treatiſes concerning the *pleas of the crown*, are thoſe of *Stamford*, *Coke*, *Hale*, and *Hawkins*. Of the firſt of theſe, the author hath made little uſe, further than as he is adopted by the other three. As to which three great authorities, where the law hath been declared by Lord *Coke*, and not controverted by any other, nor altered ſince his time by any act of parliament, or judicial determination, the author hath given to him the preference. And where any of theſe differeth from the other, he hath noted the difference.

In citing of Mr. *Hawkins*, he hath not thought it allowable, as is uſual with others, to omit the ſeveral degrees of caution and aſſent, with which he delivereth his opinion; as, *it ſeemeth*, or *it hath been ſaid by ſome*, or *it ſeemeth to be the better opinion*, or *it ſeemeth to be agreed*, and the like; which are by no means arbitrary words without much meaning, but are inſerted by him with the utmoſt deliberation and judgment.

As to the books of *reports*; where the caſes therein have been conſidered by Mr. *Hawkins*, and

and the other learned perſons before mentioned, the author hath judged it very proper to leave the matter there as ſettled by them. As to the reſt he hath by no means thought himſelf of ability to proceed in Mr. *Hawkins*'s manner, by laying together all the reports on the ſame ſubject, and thereupon extracting an opinion out of the whole; but hath inſerted the ſame at large, or what he hath thought moſt material thereof, and left the determination thereupon to the reader's better judgment.

And here it may be requiſite that the reader be admoniſhed, not to expect that the book ſhall be more perfect than the materils of which it is compoſed. All the books of reports are not of equal authority. Many of them are only notes that had been taken for gentlemen's own private uſe; which doubtleſs, would have been much more perfect, had they intended them for publication. For theſe, or any other, the author himſelf voucheth not: And, as he doth not add to their credit, ſo he doth not detract from it: but leaveth every author (as he need muſt) to anſwer for himſelf. For he hath made it an invariable rule upon all occaſions, to cite his authorities, what ſuch ſoever they be; and, in all material inſtances, in the very words of the original authors: that ſo, what may be of good authority in itſelf, ſhall not be rendered leſs ſo by his handling of it. And where no authority is alledged, he deſires the reader will look upon it as ſuch, namely, as having no authority; the ſame being nothing but the author's own private obſervations, which are ſubmitted to every reader's judgment, to aprove or reject as he ſhall ſee cauſe.

The books of authority concerning the *office of a juſtice of the peace*, are thoſe of *Fitzherbert*, *Crompton*, *Lambard*, and *Dalton*; the laſt of which was publiſhed in the reign of king *James* the firſt: ſince which time, no book under that title hath been allowed as ſufficiently authentic. And even the additions which have been made to *Dalton* ſince his death, ſeem to have no better claim to an uncontroulable authority, than other collections which have not obtained it. And *Dalton* himſelf is much injured in the modern editions, in like manner as was obſerved before of Mr. *Hawkins*, by delivering that as abſolute, which Mr. *Dalton* publiſhed under the ſeveral degrees of aſſent or doubtfulneſs before mentioned; and which the author in juſtice to Mr. *Dalton*, hath reſtored.

Where *Dalton* hath adopted *Lambard*, *Crompton*, and *Fitzherbert* (which he doth moſt frequently in their own words), the author hath thought it ſufficient to cite *Dalton*'s ſingle authority. And generally, in all other caſes, where authors are agreed, he hath judged it unneceſſary to alledge more than one or two good vouchers.

Concerning the other books of this kind, which have been publiſhed ſince *Dalton*'s time, it is unneceſſary to inlarge; ſince of the moſt of them the author hath made no uſe, and of the reſt very ſparingly; and he will not ſeek to recommend his own book, by finding fault with others before him.

ORTON, WESTMORLAND,
Sept. 29, 1754.

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CONCERNING THE

FIFTEENTH EDITION.

WHAT alterations have been neceſſary to be made from time to time ſince the firſt publication of this book, may be eaſily conceived from the variety of materials which have been introduced from the reports of Caſes adjudged in the courts of Weſtminſter-hall, and the Statutes enacted during that period.

When this book was firſt publiſhed, in the year 1754, there had been few Reports adjudged in the reign of king George the firſt, and almoſt none in the reign of king George the ſecond. But now this deficiency hath been abundantly ſupplied by a greater number of Reports of caſes, determined in matters ſubject to the juriſdiction of the juſtices of the peace, than had been in the whole period before that time from the firſt inſtitution of the office of that magiſtrate.

The Statutes or acts of parliament which have been made during the ſaid time, connected more or leſs with the office of a juſtice of the peace, are in number above three hundred; beſides almoſt half as many more that have been repealed, ſuperſeded, or permitted to expire.

By the means of which ſtatutes, ſo many new matters are in every ſeſſion of parliament brought

under the juriſdiction of theſe juſtices, and ſo many alterations are made in ſubjects of which they before had cognizance, that every new edition, in order to keep peace with the law, is in effect a new book. And this is unavoidable. To publiſh thoſe alterations ſeparately in an annual appendix, is a work of more difficulty than may be at firſt apprehended. For to effect this to any ſufficient purpoſe, many titles muſt be taken in pieces, and wholly new modelled; ſometimes one act of parliament breaks into ſeveral different titles, all of which muſt be ſurveyed, and rendered conſiſtant with each other; and new titles frequently ariſe upon new emergencies. Theſe alterations and additions in any one year would increaſe to a volume of no inconſiderable dimenſions, and in two or three years time would be productive of infinite confuſion; and, notwithſtanding all reaſonable attention that might be employed, the book and all the appendixes, and the ſeveral appendixes one with another, would be at variance. The beſt appendix that the author can imagine is, the ſtatutes at large every year, ſo far as juſtices of the peace are concerned therein; which ſtatutes as no acting juſtice ought to be without, this would therefore upon that account create unto him no additional expence.

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TO THE

PRESENT EDITION.

IN the ſucceſſive and numerous Prefaces to the preceding Editions, the Author has given a judicious and accurate account of the method he obſerved in the arrangment of this Work, and of the materials from which it was firſt formed, and afterwards improved; ſpecifying alſo, from time to time, the various additions he had made: And in the Advertiſement to the fifteenth Edition (which the Reader is requeſted to peruſe) he has given a comprehenſive view of the growth of the Work during the ſpace of thirty-one years, which had revolved ſince its firſt apperance in 1754.

The many and very early opportunities given me by my father to obſerve the method he purſued in making the neceſſary alterations and additions to every new edition, and ſelecting from the Reports ſuch adjudged caſes as ſeemed beſt to explain the laws on which the determination of the courts were founded, and his more particular inſtructions to me to make extracts from the new acts of parliament, and in forming other neceſſary collections for the work, has enabled me to purſue his plan in the preſent publication, which with becoming diffidence is now offered to the publick.

In

In the ſhort interval between the publication of the laſt Edition, and my father's death in November 1785, he continued to make his corrections as uſual. Theſe, together with the former Appendix, and all the Acts of Parliament and adjudged Caſes from that time, are now interwoven under their reſpective heads. The Acts which interfere more or leſs with the office of a Juſtice of the Peace, are ſo numerous within the above ſhort period, on account of the many additional new taxes, and the new arrangement of the duties of Cuſtoms and Exciſe, as to amount to above *eighty;* and there are more than that number of new adjudged Caſes. The Reader will not therefore be ſurpriſed at the increaſed bulk of the volumes; and he may be aſſured that no labour or attention has been ſpared to render the Book complete to the preſent time, and ſtill worthy of that patronage with which it has been ſo long honoured.

JOHN BURN.

ORTON, WESTMORLAND,
Auguſt 20, 1788.

INTRODUCTION,

Conſiſting of TWO PARTS;

CONTAINING,

I. *Certain abbreviations made uſe of in this work.*

II. *Some general rules to be obſerved, in the conſtruction of ſtatutes or acts of parliament.*

I. *Certain abbreviations made uſe of in this work.*

IN order to keep the book within a reaſonable compaſs, the following *abbreviations* are made uſe of.

1. The word *juſtice* is always to be underſtood to mean *juſtice of the peace*, when not otherwiſe expreſſed. *Juſtice.*

2. The words *one juſtice* ſhall be underſtood to ſignify *one or more juſtices*, ſo that what is directed to be done by one, ſhall not be intended thereby to exclude others from joining with him. *One juſtice.*

3. In like manner, *two juſtices*, when not otherwiſe expreſſed, ſhall be underſtood to ſignify *two juſtices or more.* *Two juſtices.*

4. So alſo a conviction on the oath of *one witneſs*, ſhall be underſtood to denote *one witneſs or more.* *One witneſs.*

5. And *two witneſſes* ſhall denote *two or more witneſſes.* *Two witneſſes.*

6. (1 Q.) ſhall be underſtood to ſignify *one whereof is of the* Quorum. *Quorum.*

7. The

Majority. 7. The *juſtices in ſeſſions* ſhall ſignify the ſaid juſtices, or *the major part of them.*

Seſſions. 8. The word *ſeſſions* ſhall denote *the general quarter ſeſſions*, if not otherwiſe expreſſed.

Warrant. 9. The word *warrant* ſhall always ſignify *warrant under hand and ſeal*, where not expreſſed otherwiſe.

Judge of aſſize. 10. Judges or juſtices of *aſſize* ſhall be underſtood to ſignify alſo thoſe of *Niſi Prius, Oyer and Terminer, and General Goal Delivery.*

Mayor. 11. The word *mayor* ſhall always be underſtood to imply *bailiffs and other chief officers in corporations*, by what appellation ſoever dignified.

Conſtable. 12. The word *conſtable* ſhall always be underſtood to imply *tythingman, borſholders, headboroughs, and other officers* required to execute the juſtices warrants.

Overſeer. 13. The word *overſeer* ſhall be underſtood to mean *overſeer of the poor*, where not expreſſed otherwiſe.

Poor. 14. Where a penalty, or part thereof is expreſſed to be given to the *poor*; that ſhall be always underſtood to denote *the poor of the pariſh where the offence was committed*, if not otherwiſe limited.

Penalty. 15. Where a penalty is to be recovered before the juſtices of the peace, it is thought indiſpenſable to inſert particularly the manner of recovering the ſame; but where it is to be ſued for in any of his majeſty's courts of record at *Weſtminſter* it is judged not neceſſary to ſet forth the ſpecial method of procedure there: and generally, where it is expreſſed, that a perſon ſhall do, or not do ſuch a thing, on pain of ſuch a ſum, without more, it ſhall be underſtood that ſuch penalty is not recoverable before the juſtices of the peace, but only in the courts at *Weſtminſter.*

Overplus. 16. In all caſes of *diſtreſs and ſale*, it ſhall be underſtood that the *overplus* muſt be returned to the owner; after the ſum or ſums to be thereout deducted, ſhall be ſatisfied and paid.

17 *Lands.*

17. *Lands* ſhall be underſtood to ſtand for *lands, tenements and hereditaments.* *Lands.*

18. Where *tranſportation* is directed for any offence, it ſhall always be underſtood, *that if the offender ſhall return before the time limited, he ſhall be guilty of felony without benefit of clergy.* *Tranſportation.*

19. In the blank ſpaces for the names in the precedents, inſtead of inſerting initial letters arbitrarily, it is thought it may be ſome help to the memory, that *A. O.* ſhall ſignify the offender, *A. I.* the informer, *A. W.* the witneſs, *J. P.* the juſtice of the peace, and the like. *Blank ſpaces.*

20. Alſo, for brevity's ſake, ſums of money and other numbers are uſually expreſſed by figures, and not in words at length; but it is to be remembered, that in the forms of warrants, convictions, and other proceedings before the juſtices, they ought to be expreſſed in words at length, and not in figures. *Figures.*

21. Where a ſtatute is ſaid to be in force, until ſuch a day, month, and year, *&c.* it ſhall always be underſtood to imply, *and from thence to the end of the then next ſeſſion of parliament.* *Continuance of ſtatutes.*

22. In the ſtatutes made in the reign of the late King *William*, it is thought not neceſſary upon all occaſions to ſay *William the Third*, ſince there are no printed ſtatutes in the reigns of *William the Firſt and Second.* *Citing of ſtatutes.*

Nor is it thought neceſſary in ſuch ſtatutes to add the name of Queen *Mary* to that of King *William*; but it is judged ſufficient for the underſtanding thereof, to quote the ſtatutes in this manner, *viz.*

1. *W. ſeſſ.* 2. *c.* 6. *ſ.* 3. to ſignify the ſtatute made in the parliament holden in the firſt year of the reign of King *William* the Third and Queen *Mary*, the ſecond ſeſſion thereof, chapter the ſixth, ſection the third.

23. Abbreviations in the names of books cited as authorities, or elſewhere occaſionally noted, conſiſt for the moſt part of ſome of the initial letters of the authors names, and other common diſtinctions, and more particularly in quoting *Sir William Blackſtone*, the following diſtinction *Citing of books and adjudged caſes.*

is obſerved: 1, 2, 3, 4, *Black.* denotes *Blackſtone's Commentaries*, the firſt, ſecond, third, or fourth part. *Black. Rep.* ſignifies *Blackſtone's Reports*, which though in two volumes, yet the pages being numbered progreſſively without interruption through both volumes, it is judged that it will create leſs confuſion to infert the pages only, and not the number of the volume.

The manner of quoting Sir *James Burrow*, is different by different perſons. That author, intending to publiſh reports of caſes determined in the court of King's Bench during the times of the four laſt lords chief juſtices *Hardwick*, *Lee*, *Ryder*, and *Manſfield*, begins with the laſt, juſtly ſuppoſing that the lateſt would be the firſt called for by the publick expectation, and ſo purpoſing to advance by a kind of retrograde progreſſion; in like manner as was done in the publication of *Croke's* Reports, during the reign of Q. *Elizabeth*, *James* I. and *Charles* I. Thoſe in the reign of *Charles* I. were firſt publiſhed, and ſo upwards through the times of *James* and *Elizabeth*, and are now commonly diſtinguiſhed by the titles of *Croke Charles*, *Croke James*, and *Croke Elizabeth*. But as ſome authors quote the Reports in the time of King *Charles*, from their having been firſt printed, though laſt in the courſe of deciſion, by the diſtinction of 1 *Croke*, and thoſe of *Elizabeth* by 3 *Croke*; ſo others, by the contrary rule, quote thoſe of *Elizabeth* by 1 *Croke*, and thoſe of *Charles* by 3 *Croke*: which is ſo far the parent of ſome confuſion.

Sir *James Burrow* intitles his Reports during the time of L. *Manſfield*, the *fourth part* of his Reports, and accordingly the ſame is quoted by ſome, "4 *Burrow.*" This fourth part conſiſting of five volumes in folio, is quoted by others according to the number of volumes comprehending this fourth part, thus: "1, 2, 3, 4, 5, *Burrow.*" But theſe five volumes having the pages numbered uniformly from 1 to 2835, it is thought more convenient in this book to keep this fourth part diſtinct, by the appellation of "*Burrow Manſfield*," and ſo referring to the page in whichever of the five volumes the matter ſought for may happen to be. By which method, when the three other parts in proceſs of time ſhall come to be publiſhed (which is a thing much to be deſired) they may be denominated in like manner, "*Burrow Ryder*," "*Burrow Lee*," and "*Burrow Hardwick*," which in ſome ſort may

may prevent the confuſion that happened in the publication of *Croke*'s Reports.

The ſaid Sir *James Burrow*, conſidering that it muſt needs be a conſiderable length of time before his whole collection of caſes could be publiſhed, and being deſirous in the mean time to oblige the publick with a regular courſe of deciſions in *ſettlement caſes*, ſelected out of his whole collection thoſe relating ſolely to the ſettlement of the poor, during the times of the ſaid four laſt lords chief juſtices, a moſt intereſting period, comprehending the ſpace of upwards of forty years; and publiſhed the ſame in two quarto volumes. Theſe are quoted in this book by the title of "*Burrow's Settlement Caſes.*"

The Lord Chief Juſtice *Hale* wrote a treatiſe in octavo, entitled "*Pleas of the Crown*," containing a ſketch and plan of his larger work, which was publiſhed afterwards in two volumes folio, entitled "*The Hiſtory of the Pleas of the Crown.*" In quoting theſe, the former is diſtinguiſhed thus, *Hale's Pleas*; and the latter *Hale's Hiſt.* or in a more abbreviated form, *H. H.*

So alſo the names of the terms in which the ſeveral caſes were adjudged, to wit, Hilary, Eaſter, Trinity, and Michaelmas, are expreſſed by the initial letters *H. E. T.* and *M.*

II. *Some general rules to be obſerved in the conſtruction of ſtatutes, or acts of parliament.*

To avoid repeating the ſame obſervations ſome hundreds of times, it is thought proper to premiſe the following general rules to be obſerved, in the conſtruction of ſtatutes or acts of parliament.

1. Regularly, a ſtatute in the affirmative doth not repeal a precedent affirmative ſtatute. 11 *Co.* 61. *How far an affirmative repealeth an affirmative ſtatute.*

But if the latter is contrary to the former, it amounteth to a repeal of the former. L. *Raym.* 160.

2. A ſtatute made in the affirmative, without any negative expreſſed or implied, doth not take away the common law; and therefore the party may wave his benefit by ſuch ſtatute, and take his remedy by the common law. 2 *Inſt.* 200. *How far an affirmative ſtatute altereth the common law.*

Repealing a repealing ſtatute.

3. By repealing of a repealing ſtatute, the firſt ſtatute is revived. *Readings upon the ſtatutes.* Parl.

Special power to be purſued.

4. Regularly, where an act of parliament giveth a power or intereſt to one perſon certain, by this expreſs deſignation of one, all others are excluded. 11 *Co.* 59, 64.

Power to adminiſter an oath.

5. In all caſes, where juſtices may take examinations, or other accuſation or proof, though the ſtatute doth not expreſsly ſet down that it ſhall be upon oath, yet it ſhall be intended that it ſhall be upon oath. *Dalt. c.* 115.

In what caſe the ſeſſions may execute the power given to two juſtices.

6. Generally, it is holden, that where a ſtatute appoints a thing to be done by one or more juſtices, without giving any appeal to the ſeſſions; there the juſtices in ſeſſions may do that thing: but where an appeal is given to the ſeſſions, the juſtices in ſeſſions cannot proceed originally therein, becauſe that method would take away the power of appealing.

How far an indictment will lie where another method of proſecution is appointed.

7. Where a ſtatute makes a new offence, which was no way prohibited by the common law, and appoints a particular manner of proceeding againſt the offender, as by commitment, or action of debt, or information, without mentioning an indictment; it ſeems to be ſettled at this day, that it will not maintain an indictment, becauſe the mentioning the other methods of proceeding only, ſeems impliedly to exclude that of indictment: Yet it hath been adjudged, that if ſuch ſtatute give a recovery by action of debt, bill, plaint, information, *or otherwiſe*, it authorizes a proceeding by way of indictment. 2 *Haw.* 211.

And if there is a prohibitory clauſe in the act, the offender may be indicted upon the prohibitory clauſe, notwithſtanding the penalty: But otherwiſe it is, where the act is not prohibitory, but only inflicts the forfeiture, and ſpecifies the remedy. 2 *H. H.* 171. *Burrow, Mansfield.* 543.

But where the offence was antecedently puniſhable by a common law proceeding, and a ſtatute preſcribes a particular

ticular remedy by a ſummary proceeding; there, either method may be purſued, and the proſecutor is at liberty to proceed either at common law or in the method preſcribed by the ſtatute: becauſe in that caſe the ſanction is cumulative, and doth not exclude the common law proceeding. *Bur. Manſf.* 803.

Where no method of proſecution is appointed

8. But every contempt of a ſtatute is indictable, where no other puniſhment is limited. 1 *Haw.* 60.

Where the defendant may be proſecuted both by the king, and the party grieved.

9. And whereſoever an act of parliament doth generally prohibit any thing, the party grieved ſhall not only have his action for his private relief, but the offender ſhall be puniſhed at the king's ſuit, for the contempt of the law. 2 *Inſt.* 163.

In what time proſecution ſhall be on penal ſtatutes.

10. All actions, indictments, or informations, on penal ſtatutes, for any forfeiture limited to the king, ſhall be brought within two years after the offence committed; if limited to the king and proſecutor, then within one year; and if it is not ſued for in that one year, then the king may ſue for the ſame within two years, after the expiration of that one year; and not otherwiſe. 31 *El. c.* 5. *ſ.* 5. That is to ſay, unleſs where it is otherwiſe ſpecially directed by ſubſequent ſtatutes.

Statutes not in the name of the whole legiſlature.

11. Many ancient ſtatutes are penned in the form of charters, ordinances, commands, or prohibitions from the king, without mentioning the concurrence of either lords or commons; yet inaſmuch as they have always been acquieſced in as unqueſtionably authentick, this eſtabliſhes and confirms their authority, and the defect is ſalved by ſuch univerſal reception. *Hawkins's preface to the Statutes.*

Preamble.

12. The preamble or rehearſal of a ſtatute is deemed true; and therefore good arguments may be drawn from the preamble. 1 *Inſt.* 11. But the preamble ſhall not reſtrain the operation of the enacting part; as where the preamble reciteth only a particular inconvenience, this ſhall not hinder a ſubſequent enacting clauſe from being underſtood in that more general ſenſe which the words would otherwiſe and of themſelves import,

port, ſo as to take in other inconveniences of the like kind, altho' not ſpecified in the preamble. 8 *Mod.* 144. 1 *P. Will.* 320.

May do ſuch a thing how to be underſtood.

13. Where a ſtatute directs the doing of a thing, for the ſake of juſtice, or the publick good; the word *may* is the ſame as the word *ſhall*: as where the ſtatute of the 13 & 14 *C.* 2. *c.* 12. enacts that the overſeers may make a rate to reimburſe the conſtables, this is conſtrued they *ſhall*; for they are compellable ſo to do. 2 *Salk.* 609.

Court of record.

14. Where a ſtatute directs a penalty to be recovered *in any court of record*; this ſhall not be intended of the quarter ſeſſions, unleſs it be ſpecially named in ſuch ſtatute; but only of the courts of record at *Weſtminſter*. 6 *Co.* 19. 20. 2 *Hale's Hiſt.* 29, 30.

Higher courts not intended, where the inferior are firſt mentioned.

15. It is a general rule in the conſtruction of ſtatutes, that where things of an inferior degree are firſt mentioned, thoſe of a higher dignity ſhall not be included under general ſubſequent words; as where a ſtatute ſpeaks of indictments to be taken before juſtices of the peace, or *others having power to take indictments*, it ſhall be underſtood only of other inferior courts, and not of the king's bench, or other court at *Weſtminſter*. 2 *Co.* 46. 2 *Haw.* 305.

Power to convene the parties.

16. Where a ſtatute gives power to the juſtices, to require any perſon to do a thing, as to take the oaths, the law implicitly gives them power to iſſue their precept to have the body before them; for when the law granteth any thing to any one, that alſo is granted, without which the thing itſelf cannot be: And it is againſt the office of the juſtices, and the authority given them by the law, that they ſhall go and ſeek the parties. 12 *Co.* 130, 131.

Neceſſity of ſummoning the party.

17. Where a ſtatute gives power to the juſtices of the peace, to hear and determine an offence in a ſummary way; it is neceſſarily implied, and ſuppoſed, as a part of natural juſtice, that the party be firſt cited, and have opportunity to be heard and anſwer for himſelf. 1 *Haw.* 154.

18. Where

18. Where an act of parliament gives power to two juſtices finally to hear and determine an offence, it is neceſſarily ſuppoſed, that they ſhall be both together, or which is the ſame thing in other words, that they ſhall hold a ſpecial ſeſſions for that purpoſe. And the like is, when they are to do any other judicial act, as to make an order of baſtardy, or adjudge the ſettlement of a poor perſon. For it is unknown to the laws of *England*, that two perſons ſhall act as judges in the ſame cauſe, when at the ſame time one of them is in one part of the country, and the other in another. *Two juſtices to be both together.*

19. Where a ſtatute appoints a conviction to be on the *oath of one witneſs*; this ought not to be by the ſingle oath of the informer; for if the ſame perſon ſhould be allowed to be both proſecutor and witneſs, it would induce profligate perſons to commit perjury for the ſake of the reward. L. *Raym.* 1545. *Informer's oath.*

20. Where a ſtatute directeth, that a perſon ſhall be convicted of an offence, upon the *oath of one or more witneſſes*, and ſaith nothing of the *confeſſion* of the party; yet if the offender ſhall before the juſtice confeſs the offence, he may be convicted upon ſuch confeſſion: for confeſſion is ſtronger evidence than the oath of witneſſes. *Dalt.* 109. 162. *Str.* 546. *Confeſſion.*

21. Where an act of parliament gives power to the juſtices of the peace, to take order in any matter *according to their diſcretions*; this ſhall be underſtood, according to the rules of reaſon, law, and juſtice, and not by private opinion. 5 *Co.* 100. *Diſcretionary power*

22. In all caſes where *the kingdom of* England, or *that part of* Great Britain *called* England, hath been or ſhall be mentioned in any act of parliament; the ſame ſhall be deemed to comprehend *the dominion of* Wales, *and town of* Berwick upon Tweed. 20 *G.* 2. c. 42. *ſ.* 3. *England includes Wales.*

23. It may be laid down as an invariable rule, that *the law favours liberty*: So that in the conſtruction of a penal ſtatute, where the interpretation is dubious, that ſenſe muſt be purſued (all other things being equal) which is more beneficial to the *Twelve months.*

ſubject,

ſubject, or the party ſuffering. Thus, where an act directs, that the juſtices ſhall commit an offender to priſon for 12 *months*, the juſtices may not alter the words, and commit him for *a year;* for in this reſpect, 12 months and one year are not the ſame: but the months muſt be computed at 28 days to the month, and not as kalendar months, unleſs it be ſo expreſſed in the act.

Quaker's affirmation. 24. In all caſes wherein, by any act of parliament, an oath ſhall be allowed or required; the ſolemn affirmation of quakers ſhall be allowed inſtead of ſuch an oath, altho' no particular or expreſs proviſion be made for that purpoſe in the ſaid act. 22 *G.* 2. *c.* 46. *ſ.* 3.

But no quaker ſhall by virtue hereof be qualified or permitted to give evidence in any criminal cauſe, or ſerve on any jury, or bear any office or place of profit in the government. *ſ.* 37.

Forfeiture. 25. To ſay that a perſon ſhall *forfeit* generally, or that he ſhall *forfeit to the king*, is all one; for the king ſhall have every forfeiture not otherwiſe limitted. 11 *Co.* 60.

Except where a forfeiture is *given in lieu of property and intereſt;* for there it ſhall go to the party injured. 1 *Roll's Rep.* 90.

For whereſoever a ſtatute giveth a forfeiture or penalty, againſt him which wrongfully detaineth or diſpoſſeſſeth another of his duty or intereſt; in that caſe, he that hath the wrong ſhall have the forfeiture or penalty, and ſhall have an action for the ſame upon the ſtatute, and the king ſhall not have the forfeiture in that caſe. 1 *Inſt.* 159.

Fine and ranſom. 26. Where a ſtatute ſaith, that ſuch a perſon ſhall pay *fine and ranſom* to the king; in legal underſtanding, ſuch fine and ranſom are all one: for if they were divers, then ſhould the party pay two ſums, one for the fine, and another for the ranſom; which was never done. 1 *Inſt.* 127.

At the king's pleaſure. 27. Acts of parliament that ſpeak of fines or ranſoms *at the king's pleaſure*, are always to be underſtood of the king in his courts by his juſtices. 1 *H. H.* 375.

28. It

28. It is ſaid that whereſoever a juſtice of the peace is impowered, by any ſtatute, to bind a perſon over, or to cauſe him to do a certain thing, and ſuch perſon being in his preſence ſhall refuſe to be bound, or to do ſuch thing; the juſtice may commit him to the gaol, to remain there till he ſhall comply. 2 *Haw.* 116. *Where a power of commitment is implied.*

29. When a ſtatute appoints impriſonment, but limits no time when; it ſhall be immediately. 8 *Co.* 119. *Impriſonment, when.*

30. When a ſtatute appoints impriſonment, but limits no time how long; the priſoner in ſuch caſe muſt remain at the diſcretion of the court. *Dalt.* 410. *Impriſonment, how long.*

31. Where any offender ſhall by a juſtice of the peace be committed to the houſe of correction for an offence cognizable before him out of ſeſſions, and the time and manner of puniſhment is not by law expreſsly limited; he may commit him to the houſe of correction, *there to be kept to hard labour until the next general or quarter ſeſſions, or until diſcharged by due courſe of law.* 17 G. 2. c. 5. ſ. 32. *Commitment to the houſe of correction, for what time.*

32. Wherever a ſtatute makes any offence *felony;* it incidentally gives it all the properties of felony at common law. 1 *Haw.* 105. *Statute making an offence felony.*

33. Therefore an act of parliament that makes an offence felony, doth conſequently introduce the puniſhment of concealing, that is, miſpriſion of felony; and every offence made felony by act of parliament, includeth miſpriſion. 1 *H. H.* 708. *Miſpriſion.*

34. An act making a new felony, extendeth not to infants under 14 years of age; but if they be of that age it binds them. 1 *H. H.* 706. *Infants.*

35. Not only thoſe crimes which are made felonies by the expreſs words of any ſtatute, but alſo thoſe which are decreed to have or undergo *judgment of life and member*, do become felonies thereby, whether the word felony were mentioned or not. 1 *Haw.* 107. *Life and member.*

Body and goods. 36. But an offence ſhall never be made felony by the conſtruction of any doubtful and ambiguous words of a ſtatute; and therefore if it be only prohibited under pain of *forfeiting body and goods*, or of being *at the king's will for body, lands, and goods*, it ſhall amount unto no more than a high miſdemeanor, puniſhable by impriſonment or the like. 1 *Haw.* 107.

Benefit of clergy. 37. All felonies by the common law have the benefit of clergy; therefore where a ſtatute enacts a felony, and ſays, the offender ſhall *ſuffer death*, clergy lies notwithſtanding, and is never ouſted without expreſs words. 3 *Inſt.* 73. 2 *Haw.* 342.

Forfeiture of dower. 38. Saving of *dower* in a ſtatute making an offence felony, is ſuperfluous; for by the 1 *Ed.* 6. *c.* 12. dower is not loſt by the felony of the huſband. *ſ.* 17.

Coſts. 39. Where any complaint ſhall be made before a juſtice, and a warrant or ſummons ſhall iſſue in conſequence thereof; the juſtice, upon hearing and determining the matter, may award *coſts* to either party: But if the conviction be upon a penal ſtatute, and the penalty amounts to 5l. or upwards, the coſts ſhall be deducted out of the penalty. 18. *G.* 3. *c.* 19.

Damages. 40. Upon an Indictment or other criminal proſecution, no *damages* can be given to the party grieved: But it is every day's practice in the court of king's bench, to induce defendants to make ſatisfaction to the proſecutors, by intimating an inclination on that account to mitigate the fine due to the king. 2 *Haw.* 210.

Treble damages. 41. Where a ſtatute gives *treble damages*; the juſtices are not to aſſeſs the damages, and then treble them; bnt the jury ought to find the damages, and then the juſtices are to treble them. *Cro. Car.* 449.

Diſtreſs and ſale. 42. In all caſes where a juſtice is or ſhall be required, by any act of parliament, to iſſue a warrant of diſtreſs for the levying of any penalty inflicted, or any ſum of money directed to be paid by ſuch act; it ſhall be lawful for ſuch juſtice granting the warrant, therein to order and direct the goods diſtrained

to

to be ſold within a certain time to be limited in ſuch warrant, ſo as ſuch time be not leſs than 4 days, nor more than 8 days, unleſs ſuch penalty or ſum of money, together with reaſonable charges of taking and keeping the diſtreſs, be ſooner paid. And the officer making ſuch diſtreſs, may deduct the reaſonable charges of taking, keeping, and ſelling the ſaid diſtreſs; and the overplus (if any) ſhall be returned to the owner on demand. (Except only in caſes of diſtreſs for quakers tithes and church rates.) 27 *Geo.* 2. *c.* 20.

43. An act inflicting a penalty for a *ſecond offence*, muſt always be underſtood, after conviction and judgment for the firſt offence; and the ſecond offence muſt be committed after the firſt conviction, and judgment thereupon given: for it doth not appear to be an offence, until judgment by proceeding of law be given againſt the offender. 2 *Inſt.* 468. *Second offence.*

And the indictment for a ſecond offence, muſt recite the record of the firſt conviction; and upon the evidence, the record of the firſt conviction muſt be proved: but the matter of the firſt conviction ſhall never be re-examined, but muſt ſtand for granted. 2 *H. H.* 636.

ABDU-

Abjuration Oath. See OATHS.

ACCESSARY.

I. Of accessaries in general.
II. Of accessaries before the fact.
III. Of accessaries after the fact.
IV. How they are to be proceeded against.

I. Of accessaries in general.

Accessary what.

1. ACCESSARY *(quasi* accedens *ad culpam)* is *he that is not the chief actor, but one that is concerned in the felony by commandment, aid, or receipt.*

In the highest offence, no accessaries.

2. In the highest capital offence, namely, high treason, there are no accessaries, neither before nor after; for the consenters, aiders, abettors, and knowing receivers and comforters of traytors are all principals. 1 *Hale's Hist.* 613.

But yet as to the course of proceeding, it hath been, and indeed ought to be the course, that those who did actually commit the very fact of treason, should be first tried, before those that are principals in the second degree; because otherwise this inconvenience might follow, that the principals in the second degree might be convicted, and yet the principals in the first degree may be acquitted, which would be absurd. 1 *H. H.* 613.

In the lowest offences, no accessaries.

3. In cases that are criminal, but not capital, as in *petit larceny* and *trespass*, there are no accessaries; for the accessaries *before* are in the same degree as principals; and accessaries *after*, by receiving the offenders, cannot be in law under any penalties as accessaries, unless the acts of parliament that induce those penalties do expressly extend to receivers or comforters, as some do. 1 *H. H.* 613.

Accessaries only in felony.

4. It remains therefore, that the business of this title of accessaries refers only to *capital felonies*, whether by the common law, or by act of parliament.

Accessaries implied in felony.

5. Concerning which, Lord *Coke* observes generally, that when an offence is felony, either by the common law, or by statute, all accessaries both before and after are incidentally included. 3 *Inst.* 59.

Accessaries in felonies by statute.

6. But as to felonies by act of parliament, Lord *Hale* distinguishes thereupon as follows: Regularly (he says) if * an act of parliament enact an offence to be felony, though it mention nothing of accessaries before or after, yet virtually and consequentially those that counsel or command the offence are accessaries before, and those that knowingly receive the offender are accessaries after. 1 *H. H.* 613. *P. 2.

But if the act of parliament that makes the felony, in express terms comprehend accessaries before, and make no mention of accessaries after, namely, receivers or comforters, there it seems there can be no accessaries after; for the expression of procurers, counsellors or abet-

tors, all which import acceſſaries before, make it evident, that the law-makers did not intend to include acceſſaries after, which is an offence of a lower degree than acceſſaries before. 1 *H. H.* 614.

And although it be generally true, that an act of parliament creating a felony, renders conſequentially acceſſaries before and after within the ſame penalty, yet the ſpecial penning of the act ſometimes varies the caſe: Thus the ſtatute of 3 *H.* 7. *c.* 2. for taking away women, makes the taking away, and the procuring and abetting, yea and wittingly receiving alſo, to be all equally *principal* felonies, and excluded of clergy. Again the ſtatute of 27 *Eliz. c.* 2. makes the coming in of a jeſuit *treaſon*, the receiving or relieving of him *felony*, the contributing of money to his relief a *præmunire*. So that acts of parliament may diverſify the offences of acceſſary or principal, according to the various penning thereof, and ſo have done in many caſes. 1 *H. H.* 614, 615.

How far acceſſaries by ſtatute ſhall have their clergy.

7. Alſo a ſtatute excluding the principals from the benefit of clergy, doth not thereby exclude the acceſſaries before or after; neither doth a ſtatute, excluding the acceſſaries, thereby exclude the principals. 2 *Haw.* 342.

II. Of acceſſaries before the fact.

Acceſſary before.

An acceſſary before the fact committed, is he that being abſent at the time of the felony committed, doth yet procure, counſel, command, or abet another to commit a felony.

Being abſent at the time of the felony committed] For if he is preſent, he is not an acceſſary, but a principal.

So alſo, if divers come to commit an unlawful act, and be preſent at the time of the felony committed, though one of them only doth it, they are *all* principals. *Hale's Pl.* 215.

So if one preſent move the other to ſtrike; or if one preſent did nothing, but yet came to aſſiſt the party if needful; or if one hold the party while the felon ſtrikes him; or if* one preſent deliver his weapon to the other that ſtrikes: for they are *preſent*, aiding, abetting, or comforting. *Id.* 216.

* P. 3.

So if ſeveral perſons ſet out together, or in ſmall parties, upon one common deſign, be it murder or other felony, or for any other purpoſe unlawful in itſelf, and each taketh the part aſſigned him; ſome to commit the fact, others to watch at proper diſtances and ſtations to prevent a ſurprize, or to favour (if need be) the eſcape of thoſe who are more immediately engaged: they are all, provided the fact be committed, in the eye of the law *preſent* at it. For it was made a common cauſe with them; each man operated in his ſtation at one and the ſame inſtant towards the ſame common end; and the part each man took tended to give countenance, encouragement and protection to the whole gang, and to inſure the ſucceſs of their common enterprize. *Foſter's Crown Law*, 350.

But if one came caſually, not of the confederacy, tho' he hindered not the felony, he is neither principal nor acceſſary, altho' he apprehend

not

not the felon; but for his negligence he is puniſhable by fine and impriſonment. *Hale's Pl.* 216. 2 *Haw.* 313.

Alſo in ſome caſes, even a perſon abſent may be principal; as he that puts poiſon into any thing to poiſon another, and leaves it, tho' not preſent when it is taken: And ſo it ſeems all that are preſent when the poiſon is ſo infuſed, and conſenting thereunto. *Hale's Pl.* 216.

Procure, counſel, command, or abet] But here note ſome diverſities: As,

(1) *When the principal doth not accompliſh the fact altogether in the ſame ſort, as it was beforehand agreed between him and the acceſſary.* And therefore if one commands another to lay hold upon a third perſon, and he lays hold upon him and robs him, the perſon commanding is not acceſſary to the robbery; for his command might have been performed without any robbery. *Dalt. c.* 116.

But if the command had been to beat him, and the party commanded doth kill him, or beat him ſo that he dieth thereof; the perſon commanding ſhall be acceſſary to the murder: for it is a hazard in beating a man, that he may die thereof. *Dalt. c.* 161.

(2) *He that commandeth or counſelleth any evil or unlawful act to be done, ſhall be adjudged acceſſary to all that ſhall enſue upon the ſame evil act, but not to any other diſtinct thing.* As if one command another to ſteal a horſe, and he ſtealeth an ox; or to rob a man by the highway of his money, and he robs him in his houſe of his plate; or to burn ſuch a *one's houſe, and he burneth the houſe of another: Theſe are other acts and felonies than he commanded to be done, and therefore he ſhall not be adjudged acceſſary to them. *Dalt. c.* 161. *P. 4.

(3) *But if a perſon commit the ſame felony, which another did command or counſel to be done, though he doth it at another time, or in another place, or in another ſort than was commanded or counſelled, yet here ſuch perſon commanding or counſelling ſhall be acceſſary.* As if he doth counſel to kill a man by poiſon, and he kills him with a dagger; or to kill him by the highway, and he kills him in his houſe; or to kill him one day, and he kill him on another day; in theſe and the like caſes, he ſhall be acceſſary. *Dalt. c.* 161.

(4) *Thoſe offences which in the conſtruction of law are ſudden and unpremeditated, cannot have any acceſſaries before.* As killing a man by miſadventure, in his own defence, or manſlaughter: For in ſuch caſe there can be no procuring, counſelling, commanding, or abetting. But there may be acceſſaries after. 1 *H. H.* 616.

(5) It ſeems to be generally agreed, that *he who barely conceals a felony, which he knows to be intended, is guilty only of a miſpriſion of felony, and ſhall not be adjudged an acceſſary*; for this is not procuring, counſelling, or abetting. 2 *Haw.* 317.

(6) Alſo, If a man counſels or commands another to kill a perſon, and before he hath killed him, he who counſelled or commanded it, repents and *countermands* it, charging him not to kill him, and yet after he doth kill him; here ſuch perſon countermanding ſhall not be adjudged acceſſary to the murder: For, generally, the law adjudgeth no man acceſſary before the fact, but ſuch as continue in that mind at the time that the felony is done and executed. *Dalt. c.* 161.

(7) But if a perſon adviſe a woman to kill her child as ſoon as it ſhall be born, and ſhe kill it in purſuance of ſuch advice; he is an ac-

ceſſary to the murder, tho' at the time of the advice, the child not being born, no murder could be committed of it: for the influence of the felonious advice continuing till the child was born, makes the adviſer as much a felon, as if he had given his advice after the birth. 2 *Haw.* 315.

III. Of acceſſaries after the fact.

Acceſſary after. *Acceſſary after the fact is, where a perſon knowing the felony to be committed by another, relieves, comforts, or aſſiſts the felon.*

*P.5. * *Knowing the felony to be committed.*] There can be no doubt, but that it is neceſſary that the receiver have notice of the felony, either expreſs or implied, and ſo to be laid in the indictment, that the receiver *knew* that the perſon received by him, had committed the principal felony. 2 *Haw.* 319.

The felony.] This, as hath been ſaid, holds place only in *felonies*, and in thoſe felonies, where by the law judgment of death regularly ought to enſue; and therefore not in petit larceny. 1 *H. H.* 618.

And therefore if a perſon do barely receive, comfort or conceal any offender guilty of any common treſpaſs, or inferior crime of the like nature, tho' he knew him to have been guilty, and that there is a warrant out againſt him, yet he is not an acceſſary to the offence; but perhaps in ſuch caſe he may be indictable for a contempt of the law, in hindering the due courſe of juſtice. 2 *Haw.* 311.

Relieves, comforts, or aſſiſts the felon.] In the explication of theſe words ſeveral things are conſiderable:

(1) Generally, any aſſiſtance whatſoever given to one known to be a felon, in order to hinder his being apprehended, or tried, or ſuffering the puniſhment to which he is condemned, is ſufficient to bring a man within this deſcription, and make him acceſſary to the felony; as where one aſſiſts him with a horſe to ride away with, or with money or victuals to ſupport him in his eſcape. 2 *Haw.* 317.

(2) But if a man knows that a perſon hath committed a felony, but doth not diſcover it, this doth not make him an acceſſary, but it is a miſpriſion of felony, for which he may be indicted, and upon his conviction fined and impriſoned. 1 *H. H.* 618.

(3) Alſo, if a man ſees another commit a felony, but conſents not, nor yet takes care to apprehend him, or to levy hue and cry after him, or upon hue and cry levied doth not purſue him; this is a neglect puniſhable by fine and impriſonment, but it doth not make him an acceſſary. 1 *H. H.* 618.

(4) In like manner, if one commit a felony, and come to a perſon's houſe before he be arreſted, and ſuch perſon ſuffer him to eſcape without arreſt, knowing him to have committed a felony, this doth not make him acceſſary; but if he take money of the felon to ſuffer him to eſcape, this makes him acceſſary: And ſo it is if he ſhuts the fore door of his houſe, whereby the purſuers are deceived, and the felon hath opportunity to eſcape, this makes him an acceſſary; for here is not a bare omiſſion, but an act done by him to accomodate the felon's eſcape. 1 *H. H.* 619.

(5) Alſo

* (5) Alſo, it ſeems to be ſettled at this day, that whoſoever reſcues a felon from an arreſt for the felony, or voluntarily ſuffers him to eſcape, is an acceſſary to the felony. 2 *Haw.* 318. *P.6

(6) But if a felon be in priſon; he that relieves him with neceſſary meat, drink, or cloaths, for the ſuſtentation of life, is not acceſſary. 1 *H. H.* 620.

(7) So if he be bailed out; it is lawful to relieve and maintain him, for he is ſtill in ſome ſort in cuſtody, and is under a certainty of coming to his trial. 1 *H. H.* 620.

(8) But if a felon be in gaol; for a man to convey inſtruments to him to break priſon to make an eſcape, or to bribe the gaoler to let him eſcape, makes the party an acceſſary: for tho' common humanity allows every man to afford ſuch perſons neceſſary relief, yet common juſtice prohibits all unlawful attempts to cauſe their eſcapes. 1 *H. H.* 621.

(9) The ſending a letter in favour of a felon, or adviſing to labour witneſſes not to appear, makes no acceſſary; but it is a high contempt. *Hale's Pl.* 219.

(10) A man may be acceſſary to an acceſſary, by the receiving of him knowing him to be an acceſſary to felony. 1 *H. H.* 622.

(11) If a man hath goods ſtolen, and he receives his goods again, ſimply, without any contract to favour the felon in his proſecution, this is lawful; but if he receive them upon agreement not to proſecute, or to proſecute faintly, this is theftbote, puniſhable by impriſonment and ranſom, but yet it makes him not an acceſſary; but if he take money of him to favour him, whereby he eſcapes, this makes him acceſſary. 1 *H. H.* 619.

(12) And if any perſon ſhall receive or buy ſtolen goods, knowing them to be ſtolen; or ſhall receive, harbour, or conceal the thieves; he ſhall be deemed an acceſſary, and be tranſported for fourteen years. 3 *W.* c. 9. *ſ.* 4. 5 *Ann.* c. 31. *ſ.* 5. 4 *Geo.* c. 11. And buying the goods at an under value, is a preſumptive evidence, that he knew they were ſtolen. 1. *H. H.* 619.

(13) It ſeems agreed, that the law hath ſuch a regard to that duty, love, and tenderneſs, which a wife owes to her huſband, as not to make her an acceſſary to felony by any receipt given to her huſband; yet if ſhe be any way guilty of procuring her huſband to commit it, it ſeems to make her an acceſſary before the fact, in the ſame manner as if ſhe had been ſole. Alſo it ſeems agreed, that no other relation beſides that of a wife to her huſband, will exempt the receiver of a felon from being an acceſſary to the felony; from whence it follows, that if a maſter receive a * ſervant, or a ſervant a maſter, or a brother a brother, or even a huſband a wife, they are acceſſaries in the ſame manner as if they had been mere ſtrangers to one another. 2 *Haw.* 320. *P.7

(14) But if the wife alone, the huſband being ignorant of it, do receive any other perſon being a felon; the wife is acceſſary, and not the huſband. 1 *H. H.* 621.

(15) But if the huſband and wife both receive a felon knowingly, it ſhall be adjudged only the act of the huſband, and the wife ſhall be acquitted. 1 *H. H.* 621.

IV. How they are to be proceeded againſt.

Acceſſaries how far bailable.

1. By 3 *Ed.* 1. *c.* 15. Thoſe who are *accuſed of the receipt of felons, or of commandment, or force, or of aid in felony done, ſhall be bailable*; but this ſeemeth to be only where it ſtands indifferent whether the party be guilty or innocent: for if there are ſtrong preſumptions of guilt, it ſeemeth that he is not bailable. 2 *Haw.* 102.

In what county to be tried.

2. Where a perſon is feloniouſly ſtricken or poiſoned in one county, and dies thereof in another county, the acceſſary may be indicted in the county where the death ſhall happen. 2 & 3 *Ed.* 6. *c.* 24. *ſ.* 2, 3.

Alſo, where a murder or felony ſhall be committed in one county, and the perſon ſhall be acceſſary in another county, the acceſſary may be indicted in the county where he was acceſſary: And the judges of aſſiſe, or two of them, of the county where the offence of the acceſſary ſhall be committed, on ſuit to them made, ſhall write to the keeper of the records where the principal ſhall be convicted, to certify them whether ſuch principal be attainted, convicted, or otherwiſe diſcharged; which he ſhall certify under his ſeal. 2 & 3 *Ed.* 6. *c.* 24. *ſ.* 4.

Acceſſary and principal in the ſame indictment.

3. The acceſſary may be indicted in the ſame indictment with the principal, and that is the beſt and moſt uſual way; but he may be indicted in another indictment, but then ſuch indictment muſt contain the certainty and kind of the principal felony. 1 *H. H.* 623.

Principal to be firſt tried.

4. It ſeemeth that the acceſſary may be put to anſwer before the principal hath appeared; but his plea cannot be tried before ſuch appearance, unleſs he deſires it himſelf; but if he will put himſelf upon his trial, before the principal be tried, he may; and his acquittal or conviction, upon ſuch trial, is good. 2 *Haw.* 322. 1 *H. H.* 623.

But it ſeemeth neceſſary in ſuch caſe to reſpite judgment, till the principal be convicted; for if the principal be after acquitted, that conviction of the acceſſary is annulled, and *no judgment ought to be given againſt him: But if he be acquitted of the acceſſary, that acquittal is good, and he ſhall be diſcharged. 1 *H. H.* 623, 624.

*P. 8.

Both tried by one inqueſt.

5. It ſeems to be ſettled at this day, that if the principal and acceſſary appear together, and the principal plead the general iſſue, the acceſſary ſhall be put to plead alſo; and that if he likewiſe plead the general iſſue, both may be tried by one inqueſt; but that the principal muſt be firſt convicted, and that the jury ſhall be charged, that if they find the principal not guilty, they ſhall find the acceſſary not guilty. But it ſeems agreed, that if the principal plead a plea in bar, or abatement, or a former acquittal, the acceſſary ſhall not be forced to anſwer, till that plea be determined: for if it be found for the principal, the acceſſary is diſcharged; if againſt the principal, yet he ſhall after plead over to the felony, and may be acquitted. 2 *Haw.* 323. 1 *H. H.* 624.

6. Anciently

6. Anciently the acceſſary could not be tried, unleſs the principal were *attainted* (3 *Ed.* 1. *c.* 14.) but by the 1 *Ann. ſtat.* 2. *c.* 9. *ſ.* 1. if the principal be convicted, or peremptorily challenge above twenty of the jury, the acceſſary may be tried and puniſhed as if the principal had been attainted; and this, although the principal be admitted to his clergy, pardoned, or otherwiſe delivered before attainder.

Acceſſary may be tried tho' the principal be not attainted.

7. But in the caſe of ſtolen goods, if the principal cannot be taken, the buyer or receiver may be proſecuted as for a miſdemeanor, to be puniſhed by fine and impriſonment, or other ſuch corporal puniſhment as the court ſhall think fit, altho' the principal be not convicted; which ſhall exempt the offender from being puniſhed as acceſſary, if the principal be afterwards taken and convicted. 1 *Ann. ſtat.* 2. *c.* 9. *ſ.* 2. 5 *Ann. c.* 31. *ſ.* 6. And by the 29 *Geo.* 2. *c.* 30. the buyer or receiver of ſtolen lead, iron, copper, braſs, bell-metal, or ſolder, may be convicted; altho' the principal hath not been convicted; and ſhall be tranſported for fourteen years.

Receiver of ſtolen goods may be tried before the principal.

And by the 10 *G.* 3. c. 48. Every perſon who ſhall buy or receive any ſtolen jewel or jewels, or any ſtolen gold or ſilver plate, watch or watches, knowing the ſame to have been ſtolen, ſhall, in all caſes where ſuch jewel or jewels, or gold or ſilver plate ſhall have been feloniouſly ſtolen, accompanied with a burglary actually committed in ſtealing the ſame, or ſhall have been feloniouſly taken by a robbery on the highway,—be triable before conviction of the principal felon whether he be in or out of cuſtody, as after his conviction: and if ſuch perſon* ſo buying or receiving ſhall be convicted thereof, he ſhall be guilty of felony, and tranſported for 14 years.

*P. 9.

8. It ſeemeth not reaſonable, Mr. *Hawkins* ſays, where a perſon is charged as acceſſary to more than one principal, to try him on the conviction of one, before all of them have appeared; becauſe hereby he may be ſubject to the hardſhip and hazard of two trials for his life for the ſame offence, which is contrary to the general courſe of the law. 2 *Haw.* 323.

Caſe where a perſon is charged as acceſſary to more than one.

But if a man be indicted as acceſſary to two or more, and the jury find him acceſſary to one, it is a good verdict, and judgment may paſs upon him. *Foſt.* 361.

And therefore the court in their diſcretion (Sir *Michael Foſter* ſays) may arraign him as acceſſary to ſuch of the principals who are convicted; and if he be found guilty as acceſſary to them or *any* of them, judgment ſhall paſs upon him: But on the other hand, if he be acquitted, that acquittal will not diſcharge him as acceſſary to the others, and when they come in and are convicted and attainted, or if judgment of outlawry paſſeth againſt them, he may be arraigned *de novo* as acceſſary likewiſe to them. Altho' it is the ſafer courſe (according to lord *Hale*) to reſpite the arraignment of the acceſſary, till all appear or are outlawed. *Foſt.* 361.

9. If

Case where the principal is erroneouſly attainted.

9. If the principal be erroneouſly attaint, yet the acceſſary ſhall be put to anſwer, and ſhall not take advantage of the error in that attainder; but the principal reverſing the attainder, reverſeth the attainder of the acceſſary. 1 *H. H.* 625.

But upon this, Sir *Michael Foſter* diſtinguiſheth as follows: If the principal and acceſſary are joined in one indictment and tried together, which ſeems to be the moſt eligible courſe where both are ameſnable to the court; there is no room to doubt, whether the acceſſary may not enter into the full defence of the principal, and avail himſelf of every matter of fact, and every point of law tending to *his* acquittal. For the acceſſary is in this caſe to be conſidered as a partner in the ſuit, and this ſort of defence neceſſarily and directly tendeth to his own acquittal. *Foſt.* 365.

But when the acceſſary is brought to his trial, *after* the conviction of the principal; it is not neceſſary to enter into a detail of the evidence on which the conviction was founded. Nor doth the indictment aver that the principal was in fact guilty. It is ſufficient if it reciteth, with proper certainty, the record of the conviction. This is evidence againſt
* 10. the acceſſary, ſufficient to put him upon his defence. * For it is founded on a legal preſumption, that every thing in the former proceeding was rightly and properly tranſacted. But a preſumption of this kind muſt, as it ſeemeth, give way to facts manifeſtly and clearly proved. As againſt the acceſſary, the conviction of the principal will not be concluſive; it is as to him *res inter alios acta.* Id.

And therefore if it ſhall come out in evidence upon the trial of the acceſſary, as it ſometimes hath and frequently may, that the offence of which the principal was convicted did not amount to felony in him, or not to that ſpecies of felony with which he was charged; the acceſſary may avail himſelf of this, and ought to be acquitted. *Foſt.* 365.

And as in point of *law*, ſo alſo in point of *fact*, if it ſhall manifeſtly appear in the courſe of the acceſſary's trial, that the principal was innocent; common juſtice ſeemeth to require that the acceſſary ſhould be acquitted. As ſuppoſe a man is convicted upon circumſtantial evidence, ſtrong as that ſort of evidence can be, of murder. Another is afterwards indicted as acceſſary to this murder; and it cometh out upon the trial by inconteſtable evidence, that the perſon who was ſuppoſed to be murdered is ſtill living; in this caſe certainly the perſon indicted as acceſſary ſhall be acquitted. Or ſuppoſe the perſon to have been in fact murdered, and that it ſhould come out in evidence to the ſatisfaction of the court and jury, that the witneſſes againſt the principal were miſtaken in his perſon (a caſe of this kind Sir *Michael Foſter* ſays he has known), that the perſon convicted as principal was not nor could poſſibly have been preſent at the murder. *Id.* 369, 368.

Acceſſary acquitted may be indicted as principal.

10. If one perſon be indicted as principal, and another as acceſſary, and both be acquitted; yet the perſon indicted as acceſſary may be indicted as principal, and the former acquittal as acceſſary is no bar. 1 *H. H.* 625.

11. But

11. But if a perſon be indicted as principal and acquitted; lord *Hale* ſays, he ſhall not be indicted as acceſſary before: And if he be, he may plead his former acquittal in bar, for it is in ſubſtance the ſame offence. 1 *H. H.* 626.

Whether the principal acquitted may be indicted as acceſſary before.

But Sir *Michael Foſter* obſerves upon this, that in the eye of the law, the offences of principal and acceſſary do ſpecifically differ; and if a perſon indicted as principal, cannot be convicted upon evidence tending barely to prove him to have been acceſſary before the fact, which muſt needs be admitted, it doth not appear how an acquittal upon one indictment can be a bar to a ſecond for an offence ſpecifically different from it. *Foſt.* 362.

* 12. So if a man be indicted as principal, and acquitted; he may be indicted as acceſſary after, for they are offences of ſeveral natures. 1 *H. H.* 626.

Principal acquitted may be indicted as acceſſary after. * 11.

13. And ſo it is if he be indicted as acceſſary before, and acquitted; yet for the ſame reaſon he may be indicted as acceſſary after. 1. *H. H.* 626.

Acceſſary before acquitted, may be indicted as acceſſary after.

Indictment of an acceſſary before the fact, taken from *Coke's* report of Lord *Sanchar*'s caſe, 9 *Co.* 116. which, as the proſecution was by the king's ſpecial command, was probably drawn by good advice; and on which *Robert Creighton* eſquire, (Lord *Sanchar* of *Scotland*) was convicted and hanged; *viz.*

Middleſex. THE *jurors do preſent for the lord the king upon their oath, That whereas* Robert Carliel *late of* London, *yeoman, and* James Irweng *late of* London *aforeſaid, yeoman, not having God before their eyes, but ſeduced by the inſtigation of the devil, the eleventh day of* May *in the year of the reign of our lord* James *by the grace of God of* England, France, *and* Ireland, *king, defender of the faith, and ſo forth, the tenth, and of* Scotland *the forty-fifth, at* London, *that is to ſay, in the pariſh of St.* Dunſtan *in the Weſt, and in the ward of* Farringdon *without* London *aforeſaid,* &c. *with force and arms,* &c. *feloniouſly and of their aforethought malice, in and upon one* John Turner *then and there in the peace of God and of the ſaid lord the king being, made an aſſault and affray, and the aforeſaid* Robert Carliel *a certain gun* [tormentum] *called a piſtol, of the value of* 5s. *then and there charged with gunpowder and a leaden bullet, which gun the ſaid* Robert Carliel *in his right hand then and there had and held, in and upon the aforeſaid* John Turner *then and there feloniouſly, voluntarily, and of his malice forethought, did ſhoot off and diſcharge; and the aforeſaid* Robert Carliel, *with the leaden bullet aforeſaid from the gun aforeſaid then and there ſhot and diſcharged, the aforeſaid* John Turner, *in and upon the left part of the breaſt of him the ſaid* John Turner, *near the left pap of him the ſaid* John Turner *then and there feloniouſly ſtruck, giving to the ſaid* John Turner, *then and there with the leaden bullet aforeſaid out of the gun aforeſaid then and there ſhot off and diſcharged, in and upon the left part of the breaſt of him the ſaid* John

John Turner, *one mortal wound of the breadth of half an inch, and depth of five inches, of which mortal wound the aforesaid* John Turner *at* London *aforesaid, in the parish and ward aforesaid, instantly died:*

* 12. *And that* * James Irweng *feloniously, and of his forethought malice, then and there was present, aiding, assisting, abetting, comforting and maintaining the aforesaid* Robert Carliel *to the felony and murder aforesaid in form aforesaid to be done and committed; and so the aforesaid* Robert Carliel *and* James Irweng *the aforesaid* John Turner *at* London *aforesaid, in the parish and ward aforesaid, in manner and form aforesaid, feloniously, voluntarily, and of their forethought malice, killed and murdered, against the peace of the lord the now king his crown and dignity*; And that one *Robert Creighton*, late of the parish of St. *Margaret* in *Westminster*, in the county of *Middlesex*, esquire, not having God before his eyes, but being seduced by the instigation of the devil, before the felony and murder aforesaid by the aforesaid *Robert Carliel* and *James Irweng* in manner and form aforesaid done and committed, that is to say, the tenth day of *May* in the year of the reign of our lord *James* by the grace of God of *England*, *France*, and *Ireland*, king, defender of the faith, and so forth, the tenth, and of *Scotland* the forty-fifth, the aforesaid *Robert Carliel*, at the aforesaid parish of St. *Margaret* in *Westminster* aforesaid, in the county of *Middlesex* aforesaid, to the felony and murder aforesaid, in manner and form aforesaid to be done and committed, maliciously, feloniously, voluntarily and of his forethought malice, did incite, move, abet, counsel and procure, against the peace of the said lord the king that now is, his crown and dignity.

If after the fact, then the form may be thus;

And that A. O. *late of* ——— *in the county of* ——— *yeoman, well knowing the said* (offender) *to have done and committed the said felony in manner and form aforesaid, afterwards, to wit, on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— *at* ——— *aforesaid in the county aforesaid, with force and arms, him the said* ——— *did then and there feloniously, and of his malice forethought, receive, aid, and comfort; against the peace of the said lord the king that now is, his crown and dignity.*

Action popular. See *INFORMATION.*

*ADDITION.**

* 13. TO prevent the inconvenience of troubling one person for another, it is enacted by 1 *H.* 5. *c.* 5. that *in every original writ of actions personal, appeals, and indictments, in which the exigent shall be awarded, to the names of the defendants additions shall be made, of their estate or degree or mistery, and of the towns, or hamlets, or places, and counties, of which they were, or be: and if by process upon the said original writs, appeals, or indictments, in which the said additions be omitted, any outlawries be pronounced, they shall be void; and before the outlawries pronounced, the said writs and indictments shall be abated by the exception of the party.*

In which the exigent shall be awarded.] The exigent is a writ whereby the sheriff is commanded to proclaim the party in the county court,

court, in order to his being outlawed. And by theſe words the act extendeth only to caſes where proceſs of outlawry may be awarded; and therefore it extendeth not to an indictment for encroaching on a highway, becauſe in that caſe proceſs of outlawry lieth not, but a diſtreſs. *Croke Eliz.* 148.

To the names of the defendants] Regularly by the common law, every natural man, having no name of dignity, ought to be named in all originals and other ſuits by his chriſtian name, and ſirname, and that, before this act, ſufficed; but if he had a name of inferior dignity (as knight or banneret) he ought to be named by his chriſtian name and ſirname, and by the addition of his name of dignity. 2 *Inſt.* 665.

If there be a corporation of one ſole perſon, that hath a fee ſimple, and may have a writ of right, he may be named by the common law by his chriſtian name without any ſirname, as *John* biſhop of *F.* 2 *Inſt.* 666.

If it be a corporation aggregate of many able perſons, as mayor and commonalty, dean and chapter; the mayor or dean need not be named by his chriſtian name, becauſe that ſuch a corporation ſtandeth in lieu both of the chriſtian name and ſirname. 2 *Inſt.* 666.

A duke, marquis, earl, viſcount, or baron might by the common law be named by his chriſtian name, and by the name of his dignity; as *John* duke of M. 2. *Inſt.* 666.

Additions ſhall be made] The addition as well of the eſtate, degree, or miſtery, as the town, hamlet, or place, ought by force of this act to be alledged, in the firſt name; for an addition after the *alias dictus* is ill: As for inſtance, where the indictment was againſt *W. R.* otherwiſe called *W. R.* of *H.* for without the *alias dictus* there is no addition of the vill; and if the party is not ſufficiently named in the firſt * part, the *alias* cannot aid or help it. 2. *Inſt.* 669. 3 *Salk.* 20. * 14

Where there are ſeveral defendants of different names, and the ſame addition, it is ſafeſt to repeat the addition after each of their names, applying it particularly to every one of them. 2 *Haw.* 187.

Where a father hath the ſame name and the ſame addition with a defendant being his ſon, the action is abateable unleſs it add the addition of *the younger* to the other additions; but where the father is the defendant, it is ſaid that there is no need of the addition of *the elder*. 2 *Haw.* 187.

Of their eſtate or degree] *Eſquire* is a good addition. And the eldeſt ſons of peers, in the life time of their fathers, though frequently titular lords, yet are only eſquires. So alſo the younger ſons of peers, and their eldeſt ſons, in perpetual ſucceſſion. Alſo the eldeſt ſons of knights, and their eldeſt ſons. There are alſo eſquires by virtue of their office, as juſtices of the peace, and others who bear any office of truſt under the crown. 1 *Blackſt.* 405.

And it ſeems clear, that no one can be well deſcribed by the addition of a temporal dignity of any other nation beſides our own; becauſe no ſuch dignity can give a man an higher title here, than that of an eſquire. 2 *Haw.* 187.

Clerk is a good addition of a clergyman; and he that hath taken any degree in either of the univerſities, may be named by that degree. 2 *Inſt.* 668. 1 *Blackſt.* 405.

Gentleman

Gentleman and *gentlewoman* are good additions. And as for gentlemen, ſays Sir Thomas Smith, they be made good cheap in this kingdom; for whoſoever ſtudieth the laws of the realm, who ſtudieth in the univerſities, who profeſſeth liberal ſciences, and (to be ſhort) who can live idly, and without manual labour, and will bear the port, charge, and countenance of a gentleman, he ſhall be called Mr. ſuch a one, and ſhall be taken for a gentleman. 1. *Blackſt.* 406.

Yeoman is a good addition; under which denomination are comprehended thoſe who have freehold land of 40s. a year, and thereby heretofore could ſerve upon juries, and can yet vote for knights of the ſhire, and do any other act where the law requires one that is *a good and lawful man.* Id.

Widow, or *ſinglewoman*, (or, as ſome ſay) *wife* of ſuch a one, are all of them good additions of the eſtate or degree of a woman; but no ſuch like addition is good, for the eſtate and degree of a man. Alſo *Spinſter* is a good addition of a woman. 2 *Haw.* 188.

* 15. * *Or miſtery*] This includeth all lawful arts, trades and occupations, as taylor, merchant, mercer, pariſh clerk, ſchoolmaſter, huſbandman, labourer, and the like. 2. *Haw.* 188.

But ſervant, groom, or farmer are not additions within this act, becauſe they are not of any miſtery. And chamberer, butler, pantler, or the like, are additions of offices, and not of any miſtery or occupation. 2 *Inſt.* 668.

Neither doth this act extend to unlawful practices, as extortioner, maintainer, thief, vagabond, heretick, and ſuch like. 2 *Haw.* 188.

If a man hath divers arts, trades or occupations, he may be named by any of them; but if a gentleman by birth be a tradeſman, he ſhall not be named by his trade, but by the degree of gentleman, becauſe it is worthier than the addition of any miſtery. And in general a man ſhall be named by his worthieſt title of addition. 2 *Inſt.* 668, 669.

And of the towns or hamlets] If there be two towns in a county of the ſame principal name, with different additions to diſtinguiſh them from one another, as *Great Dale* and *Little Dale*, or *Upper Dale* and *Lower Dale*, and the defendant named only of the principal town without any addition, as of *Dale* only, the defendant may plead that there are two *Dales* in the ſame county, and none without an addition. But if there be two towns of the ſame name in a county, without any addition to diſtinguiſh them, it may be ſufficient in ſuch caſe to name the defendant generally of either of ſuch towns, without adding any thing to diſtinguiſh it from the other. 2 *Haw.* 189.

If the defendant live in a hamlet of a town, it is ſaid to be in the election of the party to name him either of the hamlet or of the town. 2 *Haw.* 189.

But the addition of a pariſh, if there be two or more towns in it, is not good; but if there be but one town, the addition of pariſh is good. 2 *Inſt.* 669.

The addition of the place of habitation of a wife, is ſufficiently ſhewn, by ſhewing that of the huſband; becauſe it ſhall be intended that the wife lives where the huſband does. 2 *Haw.* 190.

Or places] If the defendant lives in a place known by a ſpecial name, and lying out of any town or hamlet, he may be well named of ſuch

place;

place; but if he live in any place known within a town or hamlet, it is ſaid to be ſafeſt to name him of the town or hamlet. 2 *Haw.* 189, 190.

Of which they were or be] The addition of the eſtate, degree, or miſtery, ought to be as the defendant was of at the day of the indictment brought, and not *late* of ſuch a * degree or miſtery; but it is a good addition to name the defendant *late* of ſuch a town or place, becauſe men do often remove their habitation. 2 *Inſt.* 670. * 16.

So in the caſe of lord *Balmerino*, after the rebellion in the year 1745, the indictment charged, that Arthur lord Balmerino *late of the city of Carliſle in the county of Cumberland* did ſo and ſo, lord Balmerino objected, that this was no title belonging to him; upon which the lord high ſteward informed him, that theſe words were not made part of his title, but only an addition of *place*, which the law for good reaſons requires to be inſerted by way of deſcription of defendants in all indictments, and it is moſt commonly taken from that place where the crime is by ſuch indictment charged to have been committed. *Lord Balmerino's Trial*, p. 12. *State Trials*, vol. 9.

Shall be void] This being a judgment in law, is interpreted to be made void by a writ of error, or by the plea of the party coming in upon a *capias utlagatum*; for though the ſtatute ſaith they ſhall be void, yet they are but voidable by a writ of error or plea. 2 *Inſt.* 670.

By the exception of the party] But if the defendant appeareth upon proceſs, and plead, taking no advantage thereof by exception, he hath loſt the benefit hereof: but it ſeemeth that the bare appearance of the party without plea, doth not ſalve the want of a good addition. 2 *Haw.* 190.

Adultery. See *LEWDNESS.*

AFFRAY.

I. What is an affray.
II. How far it may be ſuppreſſed by a private perſon.
III. How far by a conſtable.
IV. How far by a juſtice of the peace.
V. Puniſhment of an affray.

I. What is an affray.

1. AN *affray is a public offence to the terror of the king's ſubjects; ſo called* (according to lord Coke) *becauſe it affrighteth and maketh men afraid.* 3 Inſt. 158.

2. From whence it ſeemeth clearly to follow, that there may be an *aſſault*, which will not amount to an *affray*; as where it happens in a private place, out of the hearing or ſeeing of any, except the parties concerned; in * which caſe it cannot be ſaid to be to the terror of the people. 1 *Haw.* 134. * 17.

3. Alſo it is ſaid, that no quarrelſome or threatning words whatſoever, ſhall amount to an affray; and that no one can juſtify laying his hands on thoſe who ſhall barely quarrel with angry words, without coming to blows; yet it ſeemeth, that the conſtable may, at the requeſt of the party threatened,

threatened, carry the perſon who threatens to beat him, before a juſtice in order to find ſureties. 1 *Haw.* 135.

4. Alſo, it is certain, that it is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the meſſenger of ſuch a challenge; or even barely to endeavour to provoke another to ſend a challenge, or to fight; as by diſperſing letters to that purpoſe, full of reflections, and inſinuating a deſire to fight. 1 *Haw.* 135.

5. But although no bare words in the judgment of law, carry in them ſo much terror as to amount to an affray, yet it ſeems certain, that in ſome caſes there may be an affray, where there is no actual violence; as where a man arms himſelf with dangerous and unuſual weapons, in ſuch a manner as will naturally cauſe a terror to the people; which is ſaid to have been always an offence at the common law, and is ſtrictly prohibited by ſtatute: For by 2 *Ed.* 3. *c.* 3. it is enacted, that *no man of what condition ſoever, except the king's ſervants in his preſence, and his miniſters in executing their office, and ſuch as be in their company aſſiſting them, and alſo upon a cry made for arms to keep the peace, ſhall come before the king's juſtices, or other of the king's miniſters doing their office, with force and arms, nor bring any force in affray of peace, nor go nor ride armed, by night or day, in fairs or markets, or in the preſence of the king's juſtices or other miniſters, or elſewhere: upon pain to forfeit their armour to the king, and their bodies to priſon at the king's pleaſure. And the king's juſtices in their preſence, ſheriffs and other miniſters in their bailiwicks, lords of franchiſes and their bailiffs in the ſame, and mayors and bailiffs of cities and boroughs within the ſame, and borough-holders, conſtables and wardens of the peace within their wards, ſhall have power to execute this act. And the judges of aſſize may puniſh ſuch officers as have not done their duty herein.*

Upon a cry made for arms to keep the peace] It is holden upon theſe words of exception, that no perſon is within the intention of this ſtatute, who arms himſelf to ſuppreſs dangerous rioters, rebels, or enemies, and endeavours to ſuppreſs or reſiſt ſuch diſturbers of the peace and quiet of
* 18. the realm. 1 *Haw.* 136.

* *In affray of peace*] *En effrayer de la pees*; Lord *Coke* has it *pais*, of the country, or the people; and ſo, he obſerves, that the writ grounded upon this ſtatute ſaith, In quorundam *de populo* terrorem; and therefore the printed book, *in affray of peace*, ought to be amended. 3 *Inſt.* 158.

And it is holden upon theſe words, that no wearing of arms is within the meaning of this ſtatute, unleſs it be accompanied with ſuch circumſtances as are apt to terrify the people; from whence it ſeems clearly to follow, that perſons of quality are in no danger of offending againſt this ſtatute, by wearing common weapons, or having their uſual number of attendants with them, for their ornament or defence, in ſuch places, and upon ſuch occaſions, in which it is the common faſhion to make uſe of them, without cauſing the leaſt ſuſpicion of an intention to commit any act of violence, or diſturbance of the peace. 1 *Haw.* 136.

Nor to go nor ride armed] It is holden, that a man cannot excuſe the wearing ſuch armour in publick, by alledging that ſuch a one threatened him, and that he wears it for the ſafety of his perſon from his aſſault; but it hath been reſolved, that no one ſhall incur the penalty of the ſaid ſtatute for aſſembling his neighbours and friends in his own houſe againſt

thoſe who threaten to do him any violence therein, becauſe a man's houſe is his caſtle. 1 *Haw.* 136.

Their bodies to priſon] The ſtatute of 20 *R.* 2. *c.* 1. adds a fine likewiſe.

Wardens of the peace] It is holden, that any juſtice of the peace, or other perſon who is impowered to execute this ſtatute, may proceed thereon *ex officio*; and if he find any perſon in arms, contrary to the form of the ſtatute, he may ſeize the arms, and commit the offender to priſon; and that he ought alſo to make a record of the whole proceeding, and certify the ſame into the exchequer. 1. *Haw.* 135.

II. How far it may be ſuppreſſed by a private perſon.

1. It ſeems agreed, that any one who ſees another fighting, may lawfully part them, and alſo ſtay them till the heat be over, and then deliver them to the conſtable to be carried before a juſtice, to find ſureties for the peace. 1 *Haw.* 136.

2. And the law doth encourage him hereunto; for if he receive any harm by the affrayers, he ſhall have his remedy * by law againſt them; and if the affrayers receive hurt, by the endeavouring only to part them, the ſtanders by may juſtify the ſame, and the affrayers have no remedy by law. 3 *Inſt.* 158. * 19.

3. But if either of the parties be ſlain, or wounded, or ſo ſtricken that he falleth down for dead; in that caſe the ſtanders by ought to apprehend the party ſo ſlaying, wounding, or ſtriking, or to endeavour the ſame by hue and cry; or elſe for his eſcape they ſhall be fined and impriſoned. 3 *Inſt.* 158.

III. How far by a conſtable.

1. It ſeems agreed, that a conſtable is not only impowered, as all private perſons are, to part an affray which happens in his preſence; but is alſo bound at his peril to uſe his beſt endeavours to this purpoſe; and not only to do his utmoſt himſelf, but alſo to demand the aſſiſtance of others, which if they refuſe to give him, they are puniſhable with fine and impriſonment. 1 *Haw.* 137.

2. And it is ſaid, that if a conſtable ſee perſons either actually engaged in an affray, as by ſtriking or offering to ſtrike, or drawing their weapons, or the like; or upon the very point of entering upon an affray, as where one ſhall threaten to kill, wound, or beat another, he may either carry the offender before a juſtice, to find ſureties for the peace, or he may impriſon him of his own authority for a reaſonable time, till the heat ſhall be over, and alſo afterwards detain him till he find ſuch ſurety by obligation. But it ſeems, that he has no power to impriſon ſuch an offender in any other manner, or for any other purpoſe; for he cannot juſtify the committing an affrayer to gaol, till he ſhall be puniſhed for his offence: And it is ſaid, that he ought not to lay hands on thoſe, who barely contend with hot words, without any threats of perſonal hurt: and that all which he can do in ſuch caſe, is to command them under pain of impriſonment to avoid fighting. 1 *Haw.* 137.

3. But

3. But he is ſo far intruſted with a power over all actual affrays, that though he himſelf is a ſufferer by them, and therefore liable to be objected againſt, as likely to be partial in his own cauſe, yet he may ſuppreſs them; and therefore, if an aſſault be made upon him, he may not only defend himſelf, but alſo impriſon the offender, in the ſame manner as if he were no way a party. 1 *Haw.* 137.

4. And if an affray be in an houſe, the conſtable may break open the doors to preſerve the peace; and if affrayers * fly to an houſe, and he follow with freſh ſuit, he may break open the doors to take them. 1 *Haw.* 137.

* 20.

5. But it is ſaid, that a conſtable hath no power to arreſt a man for an affray done out of his own view, without a warrant from a juſtice, unleſs a felony were done, or likely to be done; for it is the proper buſineſs of a conſtable to preſerve the peace, and not to puniſh the breach of it. 1 *Haw.* 137.

IV. How far by a juſtice of the peace.

There is no doubt, but that a juſtice of the peace may and muſt do all ſuch things to the aforeſaid purpoſe, which a private man or conſtable are either enabled or required by the law to do: But it is ſaid, that he cannot without a warrant authorize the arreſt of any perſon for an affray out of his own view; yet it ſeems clear, that in ſuch caſe he may make his warrant to bring the offender before him, in order to compel him to find ſureties for the peace. 1 *Haw.* 137.

V. Puniſhment of an affray.

All affrays in general are puniſhable by fine and impriſonment. 1 *Haw.* 138.

And they are inquirable in the leet as common nuſances. 3 *Inſt.* 158.

Warrant to apprehend affrayers.

Weſtmorland. } To the conſtable of ———

WHEREAS A. I. *of* ——— *yeoman, hath this day made oath before me* J. P. *eſquire, one of his majeſty's juſtices of the peace for the ſaid county, that on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— A. O. *of* ——— *yeoman, and* B. O. *of* ——— *yeoman, at* ——— *in the ſaid county, in a tumultuous manner made an affray, wherein the perſon of the ſaid* A. I. *was beaten and abuſed by them the ſaid* A. O. *and* B. O. *without any lawful or ſufficient provocation given to them or to either of them, by him the ſaid* A. I. *Theſe are therefore to command you forthwith to apprehend the ſaid* A. O. *and* B. O. *and bring them before me, or ſome other of his ſaid majeſty's juſtices of the peace for the ſaid county, to anſwer the premiſſes, and to find ſureties as well for their perſonal appearance at the next general quarter ſeſſions of the peace to be holden for the ſaid county, then and there to anſwer to an indictment to be preferred againſt them by the ſaid* A. I. *for the ſaid offence, as alſo for their keeping the peace in the mean time,*

towards

towards his ſaid majeſty and all his liege people, and eſpecially towards him the ſaid A. I. *Hereof fail not, as you will anſwer the contrary at your peril. Given under my hand and ſeal at* ——— *in the ſaid county, the* —— *day of* ——— *in the year* ———

Indictment for an affray.

THE jurors for our lord the king, upon their oath preſent, that A. O. *of* ——— *in the county of* ———, *taylor, and* B. O. *of* ——— *in the ſaid county, blackſmith, with force and arms, on the* ——— *day of* ——— *in the* ——— *year of the reign of our ſovereign lord* George *the third, by the grace of God, of* Great Britain, France, *and* Ireland, *king, defender of the faith, and ſo forth, at* —— *aforeſaid, in the county aforeſaid, being arrayed and unlawfully aſſembled together in a warlike manner, did make an affray, to the terror and diſturbance of divers of the ſubjects of our ſaid ſovereign lord the king then and there being, and to the evil example of all other the ſubjects of our ſaid ſovereign lord the king, and againſt the peace of our ſaid lord the king, his crown and dignity.*

ALEHOUSES.

For matters relating to the *exciſe* on beer and ale, ſee title *EXCISE*.

I. Concerning inns and alehouſes in general.
II. Selling ale without licence.
III. Licenſing alehouſes.
IV. Recognizance, and forfeiture thereof.
V. To what places the licence ſhall extend.
VI. How long the licence ſhall continue in force.
VII. Offences in brewing of ale.
VIII. Innkeepers obliged to receive gueſts.
IX. Soldiers quartered in alehouſes.
X. Concerning ale veſſels, and the meaſure of ale.
XI. Enhancing the price of ale.
XII. Innkeepers ſuffering tipling.
XIII. Perſons guilty of tipling.
XIV. Concerning drunkenneſs.
* *XV. Detaining goods for the reckoning.* * 22.
XVI. Goods of a gueſt ſtolen out of an inn.
XVII. Gueſts ſtealing goods.

I. Concerning inns and alehouſes in general.

1. EVERY inn is not an alehouſe, nor every alehouſe an inn: but if an inn uſes common ſelling of ale, it is then alſo an alehouſe; and if an alehouſe lodges and entertains travellers, it is alſo an inn. *Difference between inns and alehouſes.*

Licence to erect inns.

2. It was reſolved by all the judges, that any perſon might erect an inn to lodge travellers, without any licence or allowance for ſuch erection. *Dalt. c.* 56. *Blackerby*, 170.

Inn indictable.

3. But it ſeems to be agreed, that the keeper of an inn may by the common law be indicted and fined, as being guilty of a public nuiſance, if he uſually harbour thieves, or perſons of ſcandalous reputation, or ſuffer frequent diſorders in his houſe, or take exorbitant prices, or ſet up a new inn in a place where there is no manner of need of one, to the hindrance of other ancient and well governed inns, or keep it in a place in reſpect to its ſituation wholly unfit for ſuch a purpoſe. 1 *Haw.* 225.

Innkeepers ſelling ale.

4. And if an inn uſeth the trade of an alehouſe, as almoſt all innkeepers do, it ſhall be within the ſtatutes made about alehouſes. *Dalt.* 133.

Inns to be licenſed.

5. It hath been alſo agreed by law, that innkeepers ought to have licence, and be bound by recognizance for keeping good order, as alehouſekeepers are. *Dalt.* 24.

Power of juſtices by the commiſſion.

6. By the commiſſion of the peace, two juſtices (1 Q.) may inquire of innholders, and of all and ſingular other perſons, who ſhall offend in the abuſe of weights and meaſures, or in the ſale of victuals, againſt the form of the ordinances in that behalf made.

II. Selling ale without licence.

By the 5 *Geo.* 3. *c.* 46. Whereas by the laws now in force, perſons ſelling ale or beer, or other exciſeable liquors by retail, without licence, are ſubject by different laws to different penalties and puniſhments, which has occaſioned much confuſion, and an ill uſe has been made thereof in many inſtances; it is therefore enacted, that every perſon lawfully convicted of ſelling ale or beer, or other exciſeable liquors, by retail, without licence (except in fairs, 5 & 6 *Ed.* 6. *c.* 25. 3. *C. c.* 3. 26 *G.* 2. *c.* 31. * and except retailers of ſpirituous liquors without licence, for whom other penalties are provided by law, 9 *G.* 3. *c.* 6.) ſhall for every ſuch offence forfeit and undergo the ſeveral penalties and puniſhments herein after mentioned, inſtead of the ſeveral pecuniary and corporal puniſhments which they are now ſubject to by any law now in force; that is to ſay, for the firſt offence 40s. and alſo the coſts and expences of conviction; if not paid within 14 days after conviction, the offender to be impriſoned for one month, unleſs he ſhall ſooner pay the penalty, and the coſts, charges and expences, of the conviction, and of executing the ſame: for the ſecond offence 4l. and alſo the coſts and expences of conviction; if not paid within one week after conviction, to be impriſoned two months, unleſs he ſhall ſooner pay the penalty, and the coſts, charges, and expences of ſuch ſecond conviction, and of executing the ſame: for the third offence 6l. and alſo the coſts and expences of conviction; if not paid within three days after conviction, to be impriſoned for three months, unleſs he ſhall ſooner pay the penalty, and the coſts, charges and expences of ſuch third conviction, and of executing the

* 23

ſame;

ſame; and the like penalty for every other offence after the third, as for the third offence. All which coſts and expences ſhall be aſcertained by the juſtice before whom the offender ſhall be convicted. One moiety of all which penalties and forfeitures ſhall be to the king; and the other moiety, and all ſuch ſuch coſts, charges, and expences to the proſecutor. *ſ.* 22.

The ſame to be heard and determined by one juſtice; who ſhall, on information (A) exhibited or complaint made to him, ſummon (B) the party accuſed, and alſo the witneſſes on either ſide (if he ſhall be required to ſummon any ſuch); and on appearance of the party accuſed, or contempt in not appearing, ſhall proceed to hear the matter, and examine witneſſes on oath, and give judgment; and if he convict (C) the party accuſed, and ſuch party ſhall refuſe to pay the penalty within the time above expreſſed, together with the coſts as aforeſaid, he ſhall iſſue his warrant for apprehending and committing (D) to priſon every ſuch offender, for ſuch time, and in ſuch manner, as the nature of the offence ſhall require. *ſ.* 23.

[Note, the *number* of witneſſes neceſſary towards the conviction is not here mentioned, and therefore this ſeemeth to reſt as it was before, on the ſtatute of the 3 *C. c.* 3. which directed the conviction to be on confeſſion of the offender or oath of two witneſſes.].

*Alſo where any juſtice ſhall ſuſpect that any perſon ſells without licence, he may call ſuch perſon before him, and alſo any exciſe officer or guager to produce his ſtock book or other account of the charge or ſurvey of ſuch ſuſpected perſon, and may examine ſuch officer on oath in what manner he charges ſuch perſon, and how ſuch perſon pays the duties; and if it ſhall appear by ſuch ſtock book or account, or oath of the officer, that ſuch perſon is ſurveyed as a victualler or retailer, and is charged with the ſame duties that victuallers and retailers are charged with and pay for any the liquors aforeſaid, and is not intitled to the allowance or abatement given to common brewers, he ſhall be deemed an alehouſekeeper, victualler, retailer, or ſeller thereof. 26 *G.* 2. *c.* 31. *ſ.* 9. * 24.

Witneſs neglecting or refuſing to appear upon ſummons at the time and place appointed, without a reaſonable excuſe to be allowed by ſuch juſtice, or appearing and refuſing to be examined on oath and give evidence; ſhall forfeit 20s. to be levied in ſuch manner and by ſuch means as is before directed. 5 *G.* 3. *c.* 46. *ſ.* 24.

Note, this penalty is but ſmall, and might defeat the intention of the act; for by the witneſs paying 20s. the offender may chance to eſcape the payment of 2, 4, or 6l. beſides charges. But there is a clauſe in the ſtatute of the 26 *G.* 2. *c.* 31. which enacts, that if any perſon ſummoned as evidence in ſuch caſe ſhall refuſe to appear, or ſhall appear and refuſe to give evidence upon oath; he ſhall forfeit 10l. *ſ.* 10. †.

† But how this 10l. ſhall be levied is not quite clear. By the aforeſaid act of the 5 *G.* 3. *c.* 46. it is expreſſed, that all penalties for offences againſt the ſaid act, or *againſt the ſaid former act*, ſhall be heard and determined as is above ſet forth. Now there are many acts mentioned before;

And if any perſon ſhall think himſelf aggrieved by the conviction of ſuch juſtice, and ſhall give ſecurity to the ſatisfaction of the ſaid juſtice for payment of the penalty, coſts, and expences, to be expreſſed in the *warrant of diſtreſs* * on ſuch conviction; he may appeal to the next quarter ſeſſions, unleſs ſuch ſeſſions ſhall be held within ſix days next after the conviction, and in that caſe to the next ſeſſions after. And if the ſeſſions adjudge the appeal to be frivolous or vexatious, they may give coſts againſt the appellant not exceeding 5l. 5 *G.* 3 *c.* 46. *ſ.* 25.

* 25.

[Note, there ſeems to be a miſtake, in ſetting forth that the coſts ſhall be expreſſed in the *warrant of diſtreſs*; for no power of diſtreſs is given: The meaning ſeems to have been, that the ſame ſhall be expreſſed in the *conviction*; as is ſpecified in the form preſcribed by the act.]

The clauſe excepting *fairs*, in the ſeveral acts is from the neceſſity of the thing, reſpecting the accommodation of perſons reſorting thither. But thoſe who ſhall brew ſuch ale or beer, to be ſold by them in fairs, muſt take care to give notice to the guagers, that the ſame may be ſurveyed; for though they are exempted from taking licence, yet they muſt nevertheleſs pay the duties of exciſe. And this indulgence ſeemeth to be intended only in the place where the common fair is held; and not in any private houſe which may be within the limits of the town where ſuch fair ſhall be kept, eſpecially wherein there are licenſed alehouſes ſufficient.

BY the ſtatute of the 4 *J.* *c.* 4. If any perſon ſhall ſell or deliver any beer or ale to any perſon that ſhall then ſell beer or ale as a common tipler or alehouſekeeper, the ſame perſon not having licence to ſell ale or beer (except it be for the uſe of his houſhold only); he ſhall forfeit for every barrel 6*s.* 8*d.* and ſo proportionably for other quantities; half to the poor, and half to him that ſhall ſue in ſeſſions, by action of debt, information, indictment, or preſentment.

III. Licenſing alehouſes.

By two juſtices at a general meeting.

1. By the 5 & 6 *Ed.* 6. *c.* 25. any two juſtices, 1 *Q.* might licenſe alehouſes; but now by the 2 *G.* 2. *c.* 28. and 26 *G.* 2. *c.* 31. it is enacted, that whereas many inconveniencies have ariſen from perſons being licenſed to keep inns and common alehouſes, by juſtices who, living remote from the places of abode of ſuch perſons, may not be truly informed as to the occaſion or want of ſuch inns or common alehouſes, or the characters of the perſons applying for licences to keep the ſame;

fore; but what ſeems to be particularly intended in this place is, ſuch act or acts as did inflict penalties on perſons ſelling ale or beer without licence. And there are three acts of this kind, which were the cauſe as aforeſaid of diverſity and confuſion. And therefore it ſeemeth that this expreſſion ſhould have run [*againſt this or the ſaid former acts*], that is, againſt the laws inflicting penalties on perſons ſelling ale or beer without licence. But as it ſtands, this penalty of 10l. ſeems to be recoverable as it was before, by the ſaid act of the 26 *G.* 2. *c.* 31. that is to ſay, by diſtreſs by warrant of one juſtice, and to be paid to the overſeers for the uſe of the poor where the offender dwells.

therefore

therefore from henceforth no licence ſhall be granted to any perſon to keep a common inn or alehouſe, but at a general meeting of the juſtices acting * in the diviſion where the ſaid perſon dwells, to be holden for that purpoſe, * 26. on the firſt day of *September* yearly, or within twenty days after, and not at any other time. Excepting, that this ſhall not alter the power or the time of granting licences, in cities and towns corporate. 2. *G.* 2 *c.* 28. *ſ.* 11, 12. 26 *G.* 2. *c.* 31. *ſ.* 4. 16.

To keep a common inn or alehouſe] In the caſe of *Parker* and *Flint*, *M.* 10 *W.* it was determined that houſes at *Epſom*, where they take in lodgers and boarders, coming to drink the waters there during the ſeaſon, and dreſs victuals, and ſell them ale and beer, and entertain their horſes at 8*d.* a day, but ſell to no other perſons, are not inns nor alehouſes within the meaning of theſe acts. 12 *Mod.* 254.

At a general meeting of the juſtices holden for the diviſion] But it is not neceſſary to ſet forth ſpecially in the licence, that it was granted at a general meeting of the juſtices holden for the diviſion; and therefore a conviction for keeping an alehouſe without ſuch licence, is not good upon the evidence of the licence only, but there muſt be other evidence. *M.* 11 *G.* 2. *King* and *Bryan.* 2 Seſſ. Ca. 183. Andr. 81.

The meeting how to be aſcertained.

2. And the day and place for granting licences ſhall be appointed by two or more juſtices for the diviſion, by warrant (E) under their hands and ſeals, at leaſt ten days before ſuch meeting directed to the high conſtables, requiring them to order (F) their petty conſtables, or other peace officers to give notice to the ſeveral innkeepers and alehouſekeepers within their reſpective conſtablewicks, of the day and place of ſuch meeting. And all licences granted at any other time and place ſhall be void. 26 *G.* 2. *c.* 31. *ſ.* 4.

Certificate of perſons to be licenſed.

3. And no licence ſhall be granted to any perſon not licenſed the year preceding (except in cities or towns corporate) unleſs he produce a certificate under the hands of the miniſter and the major part of the churchwardens and overſeers, or elſe of three or four reputable and ſubſtantial houſholders of the place, ſetting forth that ſuch perſon is of good fame and of ſober life and converſation; and it ſhall be mentioned in ſuch licence that ſuch certificate was produced, otherwiſe the licence ſhall be void. 26 *G.* 2. *c.* 31. *ſ.* 2. 16.

Except in cities and towns corporate] In cities and towns corporate, * 27. ſuch certificate is ſuppoſed not to be neceſſary, by * reaſon of the propinquity of the perſons to be licenſed.

Whether a mandamus will lie to compel the juſtices to grant a licence.

4. Nevertheleſs, although a certificate in ſuch places is not requiſite by this act, yet it is diſcretionary in the juſtices whom they will licenſe, and a *mandamus* in ſuch caſe will not lie to compel the juſtices to licenſe any perſon; and on a conviction for ſelling without licence, the want of ſuch licence can only come in queſtion, and not the reaſon why it was denied. *Strange* 881.

So in the caſe of the *King* againſt the juſtices of the peace of *Worceſter*, *M.* 4. *G.* 2. a *mandamus* was moved for to be directed to them, to grant a licence to a victualler to ſell ale. Affidavits were offered

offered to be produced, of the juſtices declaring that they would grant no licences to any of the inhabitants who ſigned a petition to the parliament for erecting a workhouſe there; and that the perſon, on whoſe behalf the motion was now made, had been a victualler in the town for above thirty-five years. The court ſaid, that they never knew a motion of this ſort granted; but if there was ſuch a grievance, as is mentioned, another ſort of motion would be more proper. 1 *Barnardiſt.* 402.

5. In the caſe of the *King* againſt *Young* and *Pitts*, *E.* 31 *G.* 2. a motion was made for an information againſt theſe two juſtices, for arbitrarily, obſtinately, and unreaſonably refuſing to grant a licence to one *Henry Day* to keep an inn at *Everſley*, *Wilts.* On ſhewing cauſe, it was inſiſted, that the legiſlature has made the juſtices the ſole judges; as being ſuch who, from the reſidence on the ſpot, muſt beſt know the perſons and their characters, and the circumſtances of the place. And the legiſlature has even excluded the juſtices of other diviſions. And the juſtices thus intruſted have a right to judge for themſelves. No man can judge for another. And this power is intruſted to them by the conſtitution, by the legiſlature. It may be very dangerous to them to be obliged to give their reaſons publicly; though they may have very ſufficient ones to ſatisfy their own minds, and to direct their own judgments. And if they are thus intruſted, why are they liable to be called to an account by any other juriſdiction, unleſs they act faultily and wilfully wrong? Indeed, if they do wilfully wrong let them be puniſhed; but where they act conſcientiouſly, they are not accountable to any body. By lord Mansfield Ch. J. It is certain this court has no power or claim, to review the reaſons of juſtices of the peace, upon which they form
* 28. their judgments in granting licences, by way of appeal from their* judgments, or over-ruling the diſcretion intruſted to them. But if it clearly appears, that the juſtices have been partially, maliciouſly, or corruptly influenced in the exerciſe of this diſcretion, and have conſequently abuſed the truſt repoſed in them; they are liable to proſecution by indictment or information; or even poſſibly by action, if the malice be very groſs and injurious. If their judgment is wrong, yet their heart and intention pure, God forbid that they ſhould be puniſhed. And he declared, that he ſhould always lean towards favouring them; unleſs partiality, corruption, or malice ſhall clearly appear. And having gone through all the particulars both of the charge and of the defence, he concluded with declaring it as his opinion, that there was no ſufficient ground for a criminal charge againſt theſe juſtices. And by the court unanimouſly, the rule was diſcharged with coſts. *Burrow, Mansfield.* 556.

Whether an information will lie.

M. 32 *G.* 2. *K.* and *Athay.* On ſhewing cauſe why a rule ſhould not be made abſolute, for an information againſt a juſtice, for a miſdemeanor in refuſing to grant a licence to one *Francis Simes* (who had been licenſed for ſeveral preceding years) to ſell ale, as uſual; and afterwards convicting him, without any previous ſummons, for having ſold it without a licence: it appeared, that the pretended grounds upon which this rule had been applied for and obtained,

were

were either falſe or fallacious. The firſt was, that the only reaſon why the licence was refuſed him was, his declining to pay a ſum of money (viz. 5l.), which was claimed of him upon a diſtinct and collateral account, and which he denied to be due from him; the payment of which ſum of money was (as he alledged) inſiſted upon by the juſtice, as a condition precedent to his granting the man a licence. The ſecond pretended ground of the motion was, that the juſtice had convicted him of the offence, without any previous ſummons.—As to the firſt: The court were unanimous, that the allegation appeared to be falſe in fact; but, at the ſame time, they declared explicitly, that the juſtices have no ſort of authority, to annex any ſuch conditions to the grant of theſe licences. As to the ſecond; They eſteemed it to be fallacious, as the fact came out upon ſhewing cauſe; for the man was actually preſent before the juſtice (who had ſent for him), and was ſo far from offering at making any defence, that he ſeemed rather to apply for mercy; declaring, however, that if the juſtice did convict him he would not pay the penalty. Thirdly, the court obſerved, * 29.
* that the man had not any where alledged, that he was innocent of the offence; which they thought it incumbent upon him to have done, to entitle himſelf to make this application againſt the juſtice.—And the rule to ſhew cauſe was diſcharged. *Burrow, Mansfield*, 653.

E. 2 *G.* 3. *K.* v. *Williams* and *Davis*. An information was granted againſt the defendants, as juſtices of the peace for the borough of *Penryn*, for refuſing to grant licences to thoſe alehouſekeepers who voted againſt their recommendation of candidates for members of parliament for that borough. It appeared, that they had acted very groſsly in this matter; having previouſly threatened to ruin theſe people, by not granting them licences, in caſe they ſhould vote againſt thoſe candidates whoſe intereſt theſe juſtices themſelves eſpouſed; and afterwards actually refuſing them licences upon this account only. And lord *Mansfield* declared, that the court granted this information againſt the juſtices, not for the mere refuſing to grant the licences (which they had a diſcretion to grant or refuſe, as they ſhould ſee to be right and proper); but for the corrupt motive of ſuch refuſal, for their oppreſſive and unjuſt refuſing to grant them, becauſe the perſons applying for them would not give their votes for members of parliament as the juſtices would have had them. *Burr. Mansf.* 1317.

T. 5 *G.* 3. *K.* v. *Hann* and *Price*, juſtices of the peace for the borough of *Corfe Caſtle*. On ſhewing cauſe againſt an information which had been prayed for againſt them, for a miſdemeanor in the execution of their office, in refuſing to grant a licence to ſell ale to one *Ingram*, an inn-keeper in that borough, merely from a motive of reſentment againſt him, for having eſpouſed an oppoſite intereſt in the election for members of that borough; the defence was, that they did not act from any reſentment or corrupt motive, but ſolely becauſe *Ingram* was an improper perſon, and had kept a diſorderly houſe, and continued to keep it after full notice to the contrary, and in particular, that he encouraged gaming and cock-fighting at his houſe. By lord *Mansfield* Ch. J. The court ſhould never interpoſe againſt magiſtrates, unleſs they have acted from bad motives and *mala fide*; eſpecially in ſuch a caſe as this, where they are intruſted with an abſolute

diſcretion:

diſcretion: but for that very reaſon, this is the ſtrongeſt caſe for the interpoſition of the court, if it appears that they have acted upon corrupt motives. If it did appear clearly that this man kept a diſorderly houſe, it would be a reaſon againſt the court's interpoſing againſt the juſtices. But this does not clearly appear. And upon the whole
* 30. he thought, * on a full diſcuſſion of the affidavits, that the charge upon the juſtices was not ſatisfactorily anſwered by them. And he declared it to be of very dangerous conſequence to permit the due diſcretion of the juſtices to be influenced by conſiderations of this kind. The court thought it a proper caſe for an information, and made the rule abſolute.

Afterwards, *M.* 6 *G.* 3. the juſtices confeſſing themſelves guilty of the information, it was moved for a rule to diſpenſe with their perſonal appearance, on the undertaking of their clerk in court to anſwer for their fines. But the court upon full debate were unanimous in refuſing the motion. The general doctrine laid down by the court was, that though ſuch a motion was ſubject to the diſcretion of the court, either to grant or refuſe it, where it was clear and certain that the puniſhment would not be corporal; yet it ought to be denied in every caſe where it was either probable or poſſible that the puniſhment would be corporal. And this, for the example ſake; as the notoriety of their being called up might deter others from the like offences. And finally, upon their appearance in court, the ſentence was, that they ſhould be committed for a month, fined 50l. each, and impriſoned till the fine be paid. *Burr. Manſf.* 1716, 1786.

What juſtices are prohibited from granting licences.

6. By the 26 *G.* 2. *c.* 13. No juſtice of the peace, being a common brewer of ale or beer, innkeeper, or diſtiller, or a ſeller of or dealer in ale or ſpirituous liquors, or intereſted in any of the ſaid trades, or being a victualler or maltſter, ſhall be capable, or have any power to grant licences for ſelling ale or beer or any other liquors, but the ſame ſhall be void. *ſ.* 11.

Stamp.

7. And all mayors, town clerks, and other perſons whom it may concern ſhall make out licences (G) duly ſtamped, before the recognizance be taken; on pain of 10l. half to the king, and half to the proſecutor, with coſts. 6 *G. c.* 21. *ſ.* 56. 1 *Ann. ſtat.* 2. *c.* 22. *ſ.* 6. Which ſtamp ſhall be firſt of all a 12d. ſtamp by the 9 *Ann. c.* 23. And then moreover a 20s. ſtamp, by the 29 *G.* 2. *c.* 12. and a further ſum of 10s. 6d. by the 24 *G.* 3. *c.* 30.

And if any perſon ſhall write any licence without ſuch ſtamp, he ſhall forfeit 10l. with coſts, to be recovered as ſtamp penalties; and the licence ſhall not be available till the duty ſhall be paid, and alſo a penalty of 5l. 29 *G.* 2. *c.* 12. *ſ.* 20.

And to prevent frauds therein, every victualler or ale-houſekeeper
* 31. ſhall, on demand by any officer of the ſtamp duties, * produce his licence, and permit him at his own expence to have a copy thereof; on pain of 40s. 5 *G.* 3. *c.* 46. *ſ.* 20.

And every clerk of the peace, town clerk, common clerk, or perſon acting as ſuch, ſhall on demand by any officer of the ſtamp duties, or within three days next after, deliver to ſuch officer, a true liſt of the

names and places of abode, of all the victuallers, alehouſe-keepers, and other perſons then licenſed to ſell ale or beer, or other exciſeable liquors, by retail, within the reſpective diſtricts; and on delivery thereof, ſuch officer ſhall pay to him after the rate of one farthing for every licenſed perſon inſerted in the liſt: And if he ſhall refuſe or neglect to deliver ſuch liſt, or not inſert therein a full and true account; he ſhall forfeit 5l. *ſ.* 21.

8. And no perſon ſhall retail any diſtilled ſpirituous liquors, or ſtrong waters, without a licence from the officers of exciſe taken out ten days before, for which he ſhall pay 40s. yearly. 16 *G.* 2. *c.* 8. *ſ.* 8. 24 *G.* 2. *c.* 40. *ſ.* 9. *Licence for ſpirituous liquors.*

And moreover, after 5th *July*, 1787, every perſon ſhall pay for a licence the ſeveral additional ſums following, (viz.)

				£.	s.	d.
If the dwelling houſe, &c, ſhall not be rated to the houſe duty impoſed by 19 *G.* 3. *c.* 59. at 15l. a year, or upwards, the ſum of				2	8	0
If rated at 15l. a year and under 20l.				2	16	0
ditto	20	ditto	25	3	4	0
ditto	25	ditto	30	3	12	0
ditto	30	ditto	40	4	0	0
ditto	40	ditto	50	4	8	0
ditto	50	or upwards		4	16	0

One eighth part thereof to be paid down at the time of taking out the licence, and another eighth part ſhall be paid at the end of every ſix weeks until the whole be paid. 27 *G.* 3. *c.* 30. *ſ.* 1, 2.

And ſuch perſon ſhall be firſt licenſed to ſell ale or ſpirituous liquors by two or more juſtices of the peace. 2 *G.* 2. *c.* 28. *ſ.* 11. 9 *G.* 2. *c.* 23. *ſ.* 14. 16 *G.* 2. *c.* 8. *ſ.* 11. 29 *G.* 2. *c.* 12. *ſ.* 22.

And the juſtices clerk ſhall have 2s. 6d. and no more, for ſuch licence. 9 *G.* 2. *c.* 23. *ſ.* 14. 24 *G.* 2. *c.* 40. *ſ.* 28, 29.

Which ſaid licences for retailing ſpirituous liquors, are treated of more at large under the article concerning ſpirituous liquors in title *EXCISE.*

* Note, here is a *double* licence required for retailing of ſpirituous liquors; firſt, a licence from the juſtices to ſell ale or *ſpirituous liquors*; and then a licence by the officers of exciſe to ſell ſpirituous liquors. And therefore the ale licence ought to run ſo as to include ſpirituous liquors, or elſe the law ſhould be altered in this particular. The printed alehouſe licences from the ſtamp office endeavour to preſerve the juriſdictions diſtinct, by excepting the ſeveral kinds of ſpirituous liquors by name, out of the licence by the juſtices. But this is againſt the ſtatutes; nor was it intended perhaps by the legiſlature, that the officers of exciſe ſhould have the ſole juriſdiction in this matter, but rather that the primary judgment concerning the ſame ſhould be referred to the juſtices. * 32.

9. By the 9 *Ann.* *c.* 23. A wine licence is directed to be on a 4s. ſtamp. And by the 30 *Geo.* 2. *c.* 19. a further duty is laid thereon of 5l. for perſons not having either ale or brandy licence; of 4l. for perſons having an ale licence, and no brandy licence; and of 40s. for perſons having both ale and brandy licence. Which is treated of under the title EXCISE. *(Wines.)* *Wine licence.*

Licence for made wines.

10. By 26 *G.* 3. *c.* 74. *ſ.* 5. Every retailer of *ſweets* or *Britiſh* made wines, ſhall take out a licence from the ſtamp office (although he hath not a ſpirit or ale licence) for which he ſhall pay a ſtamp duty of 2l. 4s. 0d. which licence ſhall exempt him from all penalties impoſed by any former act.

The other matters relating to made wines and ſweets are treated of more at large under the title EXCISE. *(Sweets.)*

IV. Recognizance, and forfeiture thereof.

Recognizance.

1. On granting licences for keeping any common alehouſe or tipling houſe, the perſon licenſed ſhall enter into a recognizance in 10l. with two ſureties in 5l. each, or one ſurety in 10l. (H) as well againſt the uſing of unlawful games, as alſo for the uſing and maintenance of good order and rule to be had and uſed within the ſame, as by their diſcretion ſhall be thought neceſſary and convenient; and if ſuch perſon ſhall be hindered through ſickneſs or infirmity, or other reaſonable cauſe to be allowed by the juſtices, to attend in perſon, they may grant the licence, on two ſureties entering into ſuch recognizance in 10l. each. 5 & 6 *Ed.* 6. *c.* 25. *ſ.* 1. 26. *G.* 2. *c.* 31. *ſ.* 1.

As by their diſcretion ſhall be thought neceſſary and convenient.] Mr. *Dalton* obſerves upon theſe words in the ſtatute of 5 & 6 *Ed.* 6. that the matter of the condition of the * recognizance is by the ſtatute partly referred to the *diſcretion of the juſtices.* And he ſays, in ſome ſhires the juſtices have agreed upon certain articles framed by their diſcretion, and generally to be propounded to all common ale ſellers; taking their bond for performance of the ſame; a copy whereof they uſed to deliver to every of them; which manner (he ſays) had been allowed.

* 33.

And amongſt articles of this kind, he recommends to the juſtices' care theſe three eſpecially. 1. That no alehouſekeeper, upon the Lord's day, ſhould receive or ſuffer to remain any perſons whatſoever, as their gueſts, in any their houſes, or other places, to tipple, eat or drink; other than travellers, and ſuch as come upon neceſſary buſineſs. 2. That they ſuffer no perſon whatſoever, reſorting to their houſes only to eat and drink, to remain there after the hour of nine in the evening in winter, and ten in ſummer. 3. That they ſuffer no perſon, reſorting to their houſes only to eat and drink, to remain tipling there above one hour, other than travellers. *Dalt. c.* 176.

To be filed at the ſeſſions.

2. Which ſaid recognizance, with the condition thereof, fairly written or printed, ſhall forthwith, or at the next ſeſſions at fartheſt, be ſent or returned to the clerk of the peace, under the hands of the juſtices, to be by him entered or filed among the records. 26 *G.* 2. *c.* 31. *ſ.* 1.

Penalty for licenſing otherwiſe.

3. And for every licence granted, without taking ſuch recognizance; and for every ſuch recognizance taken, and not ſent or returned; every juſtice ſigning ſuch licence, ſhall forfeit 3l. 6s. 8d. 5 & 6 *Ed.* 6. *c.* 25. *ſ.* 2. 26 *G.* 2. *c.* 31. *ſ.* 1.

Which

Which ſaid forfeiture for granting licences, without taking recognizances, ſhall be to him who ſhall ſue, together with coſts. 26 *G.* 2. *c.* 31. *ſ.* 6. But it is not ſaid who ſhall have the penalty for not returning the recognizance to the clerk of the peace, therefore that ſhall go to the king.

Recognizances to be calendred.

4. And the clerk of the peace ſhall keep a regiſter or calendar of all ſuch recognizances, and ſhall deliver to the juſtices, at the meeting for granting licences, a true copy of ſuch regiſter or calendar. 26 *G.* 2. *c.* 31. *ſ.* 5.

Fee for the recognizance.

5. And for every recognizance ſhall be paid by the clerks of the juſtices taking ſuch recognizances, to the clerk of the peace, for filing or recording the ſame, and for making and delivering the copies of the regiſter or calendar 1s. which ſhall be paid to the clerks of the ſaid juſtices, by the perſons licenſed, over and above the fees payable to the ſaid juſtices clerks. 26 *Geo.* 2. *c.* 31. *ſ.* 5.

Proceſs on the recognizance.

* 6. By the 5 & 6 *Ed.* 6. *c.* 25. *ſ.* 3. The juſtices ſhall have power, in their quarter ſeſſions, by preſentment, information, or otherwiſe by their diſcretion to inquire of all ſuch perſons as ſhall be admitted and allowed to keep any alehouſe or tipling houſe, and that be ſo bound by recognizance, if they have done any act whereby they have forfeited the ſame recognizance, and they ſhall upon ſuch preſentment or information award proceſs againſt every ſuch perſon ſo preſented or complained upon before them, to ſhew why he ſhould not forfeit his recognizance; and ſhall have power to hear and determine the ſame, by all ſuch ways and means, as by their diſcretion ſhall be thought good. * 34

And by the 26 *G.* 2. *c.* 31. Any juſtice on complaint or information that ſuch licenſed perſon hath committed any act, whereby in the judgment of ſuch juſtice the recognizance may be forfeited, or the condition broken, may by ſummons under hand and ſeal require ſuch perſon to appear at the general or quarter ſeſſions, then and there to anſwer to the matter of ſuch complaint, or information; and alſo may bind the complainant or any other perſon in a recognizance to appear and give evidence; and the ſeſſions may direct the jury which ſhall there attend for the trial of traverſers, or ſome other jury of twelve honeſt and ſubſtantial men, to be then and there impanelled by the ſheriff without fee, to inquire thereof; and if the jury find that ſuch perſon hath done any act whereby the recognizance is broken, ſuch act being ſpecified in ſuch complaint or information, the court may adjudge him guilty; which verdict and adjudication ſhall be final; and thereupon the court ſhall order the recognizance to be eſtreated into the exchequer, to be levied to his majeſty's uſe; and the ſaid perſon ſhall be diſabled to ſell any ale, beer, cyder, perry, or ſpirituous liquors for three years, and any licence granted to him for ſuch term ſhall be void. *ſ.* 7. Provided, that the juſtices, at the requeſt of the proſecutor, or of the party complained of, or either of his ſureties, may adjourn the trial to the then next ſeſſions. *ſ.* 8.

And if any perſon ſhall be diſabled, by conviction, to ſell ale, beer, cyder or perry; he ſhall by the ſame conviction be diſabled to ſell any ſpirituous liquors, any licence before obtained for that purpoſe notwithſtanding; and every licence granted to him for ſelling ale, beer, cyder,

perry, or ſpirituous liquors, ſhall be void; and if he ſhall ſell during ſuch diſability, he ſhall be puniſhed as for ſelling without licence; and
* 35. a certificate from the clerk of the * peace (which he ſhall grant without fee) of ſuch conviction ſhall be legal evidence. *id. ſ.* 11.

Which conviction ſhall be in this or the like form:

Middleſex. A. O. *is convicted on his own confeſſion,* (or *on the oath of* ———) *of having ſold ale, beer, or other liquors, in the pariſh of* ——— *in this county, on the* ——— *day of* ——— *after being diſabled to ſell the ſame. This is the firſt, ſecond, or third conviction. Given under my hand and ſeal this* —— *day of* ———.

Which ſaid conviction ſhall be certified to the next ſeſſions, to be filed amongſt the records. *ſ.* 13.

V. To what places the licence ſhall extend.

Licence reſtrained to the place.

1. No licence ſhall intitle any perſon to keep an alehouſe in any other place, than that in which it was firſt kept by virtue of ſuch licence; and ſuch licence with regard to all other places ſhall be void. 26 *G.* 2. *c.* 31. *ſ.* 3.

Perſon dying or removing.

2. And if any licenſed perſon ſhall die or remove out of his houſe ſo licenſed; his executors, adminiſtrators, or aſſigns who ſhall be poſſeſſed of ſuch houſe, or the occupier thereof, may continue during the reſidue of the term without any new licence or certificate. 26 *G.* 2. *c.* 31. *ſ.* 3. 29 *G.* 2. *c.* 12. *ſ.* 23.

And if any alehouſe or victualling houſe *ſhall become empty or unoccupied* after the general day for licenſing (the occupier whereof was duly licenſed the year preceding); two juſtices at a petty ſeſſions may grant a licence to any new tenant or occupier till the next general licenſing day, obtaining firſt a certificate as above mentioned. 29 *G.* 2. *c.* 12. *ſ.* 24.

Shall become empty or unoccupied.] That is, as it ſeemeth, by the removal of the former tenant; for in many places the tenants change their habitations, not in *September* when the licence is required to be granted, but at ſome future time, as at *May-day*, or *Whitſuntide*. In this caſe, where the tenant, intending to remove, hath not taken out a licence for that year, his ſucceſſor may obtain a licence until the next general licenſing day, by applying to two juſtices at a petty ſeſſions, and making it appear to them by certificate that he is a perſon fit to receive a licence, and alſo making it appear that the houſe is proper to be licenſed, whereof the proof muſt be by its having been licenſed the year next before.

* 36. * *VI. How long the licence ſhall continue in force.*

The licence granted at the general licenſing day ſhall be made for one year only, to commence on Sept. 29. 26 *G.* 2. *c.* 31. *ſ.* 4.

And

And the licence granted at a petty ſeſſions in the caſe of a licenſed houſe becoming unoccupied (as hath been ſaid) ſhall be made until the next general licenſing day. 29 *G.* 2. *c.* 12. *ſ.* 24.

VII. Offences in brewing of ale.

1. By the 1 *W. ſeſſ.* 1. *c.* 24. *ſ.* 17. No common brewer or retailer of beer or ale, ſhall uſe in the brewing or working thereof any melaſſes, coarſe ſugar, honey, or compoſition or extract of ſugar; on pain of forfeiting the liquor, and alſo 100*l.* half to the king, and half to him that ſhall ſue in ſix months.

2. And by the 10 & 11 *W. c.* 21. *ſ.* 34. If any common brewer or retailer of beer or ale, ſhall uſe any melaſſes, coarſe ſugar, honey, or compoſition or extract of ſugar, in the brewing, making, or working of any ale or beer; or if any common brewer ſhall receive into his cuſtody any quantity of any of the ſaid materials exceeding ten pounds, he ſhall forfeit 100*l.* to be recovered and mitigated as by the laws of exciſe; and the ſervant or other aſſiſting therein, ſhall forfeit 20*l.* in like manner, and in default of payment ſhall be impriſoned three months.

3. And by 9 *Ann. c.* 12. No common brewer, innkeeper, or victualler, ſhall uſe any broom, wormwood, or any other bitter ingredient (to ſerve inſtead of hops) in any beer or ale for ſale (except infuſing the ſame, after it is brewed and tunned, to make broom or wormwood ale or beer); on pain of 20*l.* half to the king, and half to the proſecutor, to be levied as by the laws of exciſe. *ſ.* 24, 26.

4. And by 12 *Ann. ſtat.* 1. *c.* 2. No common brewer, or retailer of beer or ale, ſhall uſe any ſugar, honey, foreign grains, guinea pepper, eſſentia bine, coculus indiæ, or any unwholeſome ingredients in the brewing of beer or ale, or mix any of them therewith, on pain of 20*l.* to be recovered and mitigated as by the laws of exciſe, half to the king, and half to him that ſhall ſue. *ſ.* 32.

VIII. Innkeepers obliged to receive gueſts.

If one who keeps a common inn, refuſe either to receive * a traveller * 37.
as a gueſt into his houſe, or to find him victuals or lodging, upon his tendring him a reaſonable price for the ſame; he is not only liable to render damages for the injury, in an action on the caſe at the ſuit of the party grieved, but may alſo be indicted and fined at the ſuit of the king. 1 *Haw.* 225.

Alſo it is ſaid, that he may be compelled by the conſtable of the town, or by a juſtice of the peace, to receive and entertain ſuch a perſon as his gueſt; and that it is no way material whether he hath a ſign before his door or not, if he make it his common buſineſs to entertain paſſengers. But how the officer may compel him may be a queſtion: It ſeemeth that all the officer can do, is either to cauſe ſuch alehouſe to be ſuppreſſed, or elſe to preſent ſuch offence at the aſſizes or ſeſſions, that ſo ſuch offender may be thereupon indicted. *Dalt. c.* 7.

IX. Soldiers

IX. Soldiers quartered in alehouſes.

By the yearly acts againſt mutiny and deſertion, the conſtable, and in his default, a juſtice of the peace, may quarter ſoldiers in inns, livery ſtables, alehouſes, and victualling houſes; as is ſet forth more at large in title *SOLDIERS*.

X. Concerning ale veſſels, and the meaſure of ale.

Juſtices to rate the price of veſſels.

1. The juſtices in *Eaſter* ſeſſions yearly (and mayors in corporations) ſhall rate the price of all barrels, kilderkins, firkins, and other veſſels to be ſold for ale or beer to be uttered therein: And if any cooper ſhall not ſell the ſame according to ſuch rate, he ſhall forfeit 3*s*. 4*d*; half to the king, and half to him that ſhall ſue. 8 *El. c.* 9.

Barrel, what.

2. Every barrel of beer, within the bills of mortality, ſhall be 36 gallons, and the barrel of ale 32 gallons; and in all other places, 34 gallons ſhall be reckoned for a barrel of beer or ale. 12 *C.* 2. *c.* 24. *ſ.* 34. 1 *W. ſt.* 1. *c.* 24. *ſ.* 5.

Quarts and pints to be marked.

3. By 11 & 12 *W. c.* 15. which is required to be given in charge at the ſeſſions to the grand jury, it is enacted, that all innkeepers, alehouſekeepers, ſutlers, victuallers and other retailers of ale or beer, and every perſon keeping any publick houſe, and retailing and ſelling ale or beer, ſhall retail and ſell the ſame in and from their houſes, by a full ale quart or ale pint, according to the ſtandard of the exchequer, in a veſſel made of wood, earth, glaſs, horn, leather, pewter, or of ſome other good and wholeſome metal, * made and ſized to the ſtandard, and ſigned, ſtamped, or marked to be of the content of the ſaid ale quart or ale pint, according to the ſaid ſtandard, either from the exchequer, or from ſome city, town corporate, borough, or market town where a ſtandard ale quart or pint, made from the ſaid ſtandard, ſhall be kept for that purpoſe; and ſhall not retail and utter any ale or beer, in any other veſſel not ſigned and marked; on pain of forfeiting not above 40*s*. nor under 10*s*. for every offence, half to the poor, and half to him that ſhall proſecute or ſue for the ſame, to be recovered before one juſtice, by the oath of one witneſs, and to be levied by warrant of diſtreſs, rendering the overplus, deducting thereout the reaſonable charges. *ſ.* 1. 6. The proſecution to be within thirty days. *ſ.* 6.

* 38.

And moreover he ſhall not detain any goods for the reckoning, but ſhall be left to his action at law. *ſ.* 2.

But it is not neceſſary that beer or ale ſold to be ſpent out of the houſe, be carried away in ſtandard meaſures; but it is ſufficient if it be meaſured out by the ſtandard. *ſ.* 7.

Who ſhall mark them.

4. And every mayor, or chief officer of every city, town corporate, borough, or market town, ſhall on requeſt to him made, cauſe all ale quarts and ale pints, made of wood, earth, glaſs, horn, leather, pewter, or other good and wholeſome metal, which ſhall be brought

brought to him, to be meaſured and ſized with the ſtandard in his cuſtody, and ſhall then cauſe the ſame, and every of them, to be plainly and apparently ſigned, ſtamped, and marked with W R and a crown, for which they ſhall not receive above one farthing for each meaſure; on pain of 5l. to be recovered as aforeſaid, and he ſhall alſo pay to the party grieved treble damages with coſts, by action at law. 11 & 12 *W.* c. 15. *ſ.* 5.

Note, Moſt of the books do ſet forth that the ſub-commiſſioners or collectors of exciſe ſhall procure ſtandard quarts and pints out of the exchequer, for every market town; but this was only required of them before *June* 24, 1700, and not ſince. *ſ.* 3.

Indictment. 5. An indictment will lie for ſelling ale in pots unſealed, altho' the ſtatute appoints another method of proceeding; becauſe meaſures are by the common law, and the ſtatutes only direct the manner of aſcertaining them. *Blackerby.* 10.

But in ſuch caſe the indictment muſt not be upon the ſtatute, but at the common law; and the offence ought to be laid, not for ſelling in pots unſealed, but in pots wanting meaſure.

* *XI. Enhancing the price of ale.* * 39.

By the 2 & 3 *Ed.* 6. c. 15. If any brewers ſhall conſpire to ſell their victuals but at certain prices; they ſhall, on conviction in the ſeſſions or leet, by witneſs, confeſſion, or otherwiſe, forfeit 10l. to the king for the firſt offence, and if not paid in ſix days, they ſhall be impriſoned twenty days; for the ſecond offence, 20l. in like manner, or the pillory; for the third offence 40l. in like manner, or the pillory, loſs of an ear, and to become infamous. But by the 2 *G.* 3. c. 14. No brewer, innkeeper, victualler, or other retailer of ſtrong beer or ale, ſhall be ſued or moleſted by indictment, information, popular action, or otherwiſe, for advancing the price of ſtrong beer or ale, in a reaſonable degree.

* *XII. Innkeepers ſuffering tipling.*

By the 1 *J.* c. 9. If any innkeeper, victualler, or alehouſekeeper, or tavernkeeper keeping an inn or victualling houſe, ſhall ſuffer any perſon inhabiting in any city, town corporate, market town, village, or hamlet, where ſuch inn, tipling houſe, or alehouſe ſhall be [and by 1 *G.* c. 4. wherever he ſhall inhabit], to continue drinking or tipling therein, (except ſuch as ſhall be invited by any traveller, and ſhall accompany him only during his neceſſary abode there: and except labouring and handicraftſmen, in cities, towns corporate, and market-towns, upon the uſual working days, for one hour at dinner time, to take their diet in an alehouſe; and except labourers and workmen, which for the following of their work by the day or by the great, in any city, town corporate, market town or village, ſhall for the time of their ſaid continuing in work there, ſojourn, lodge or victual in any inn, alehouſe, or other victualling houſe; and except for urgent and neceſſary occaſions to be allowed by two juſtices); he ſhall on conviction thereof before the mayor or a juſtice of the peace, on view or confeſſion,

confeſſion, or oath of one witneſs, forfeit 10s. to the poor. 1 *J.* *c.* 9. *ſ.* 2. 1 *C.* *c.* 4. 21 *J.* *c.* 7.

The ſame to be levied by the conſtables or churchwardens by way of diſtreſs; and for default of ſatisfaction in ſix days, the diſtreſs to be appraiſed and ſold, rendring the overplus; and for want of ſufficient diſtreſs, the party offending to be by ſuch mayor or juſtice committed to the common gaol, there to remain until the penalty be truly paid. 1 *J.* *c.* 9. *ſ.* 3.

* 40. And if the conſtables or churchwardens do neglect their duty in * levying, or do not levy the penalties; or in default of diſtreſs, do neglect to certify the default, by the ſpace of 20 days, to ſuch mayor or juſtice; every perſon ſo offending ſhall forfeit 40s. to the poor, to be levied by way of diſtreſs by warrant from ſuch mayor or juſtice; the diſtreſs to be detained ſix days; in which time if payment be not made, the goods to be appraiſed and ſold, returning the overplus; for want of ſufficient diſtreſs, the conſtable or churchwarden ſo offending, to be by ſuch mayor or juſtice committed to the common gaol, there to remain until the penalty be truly paid. 1 *J.* *c.* 9. *ſ.* 4.

And alſo, the ſaid offence may be inquired of and preſented before juſtices of aſſize, juſtices of the peace in their ſeſſions, mayors in corporations, and in the leet; and thereupon ſuch due proceedings ſhall be had for the conviction, as in ſuch like caſes upon any indictment or preſentment is uſed. 4 *J.* *c.* 5. *ſ.* 5.

And all conſtables, churchwardens, aleconners and ſidemen, ſhall in their ſeveral oaths incident to their offices, be charged to preſent the ſaid offence. 4 *J.* *c.* 5. *ſ.* 7.

And moreover, if any alehouſekeeper ſhall ſuffer any perſon inhabiting in any city, town corporate, market town, village or hamlet, where ſuch inn, tipling houſe, or alehouſe ſhall be, to continue drinking or tipling therein as aforeſaid; he ſhall be diſabled for the ſpace of three years to keep any ſuch alehouſe. 21 *J.* *c.* 7. *ſ.* 4.

XIII. Perſons guilty of tipling.

Penalty of tipling.

1. If any perſon (unleſs thoſe excepted under the foregoing head, by 1 *J.* *c.* 9.) ſhall continue drinking or tipling, in any inn, victualling houſe, or alehouſe, or any tavern keeping an inn or victualling houſe; he ſhall, on conviction thereof before a mayor or a juſtice of the peace, on view, confeſſion, or oath of one witneſs, forfeit for every offence 3s. 4. to be paid within one week next after the conviction, to the churchwardens, who ſhall be accountable for the ſame to the uſe of the poor: And if he ſhall refuſe or neglect to pay the ſame, it ſhall be levied by diſtreſs: And if he be not able to pay the forfeiture, then the mayor, juſtice, or court where the conviction ſhall be, may puniſh the offender, by ſetting him in the ſtocks for every offence by the ſpace of four hours. 4 *J.* *c.* 5. *ſ.* 4. 1 *J.* *c.* 9. 21 *J.* *c.* 7. 1 *C.* *c.* 4.

The ſaid offence may alſo be inquired of and preſented, before juſ-
* 41. tices of aſſize, juſtices of the peace in ſeſſions, mayors, * and in the leet; and proceeding ſhall be had thereupon for the conviction, as upon indictment or preſentment. 4 *J.* *c.* 5. *ſ.* 5.

The

The offender to be preſented, indicted, or convicted in ſix months. 4 *J.* *c.* 5. *ſ.* 11.

And all conſtables, churchwardens, aleconners, and ſidemen, ſhall in their ſeveral oaths incident to their offices, be charged to preſent the ſaid offence. 21 *J.* *c.* 7. *ſ.* 5.

2. And if any alehouſekeeper ſhall be convicted of the ſaid offence, he ſhall moreover for the ſpace of three years be diſabled to keep any ſuch alehouſe. 7 *J.* *c.* 10. 21 *J.* *c.* 7. *ſ.* 4. *Alehouſekeeper guilty of tipling.*

XIV. Concerning drunkenneſs.

1. Drunkenneſs excuſeth no crime; but he who is guilty of any crime whatever, thro' his voluntary drunkenneſs, ſhall be puniſhed for it as much as if he had been ſober. 1 *Haw.* 2. *Drunkenneſs no excuſe.*

2. If any offend their brethren by drunkenneſs, the churchwardens and ſidemen ſhall preſent the ſame to the ordinary, that they may be puniſhed by the ſeverity of the laws, according to their deſerts; and ſuch notorious offenders ſhall not be admitted to the holy communion, till they be reformed. *Can.* 109. *Spiritual cenſure.*

And all conſtables, churchwardens, aleconners, and ſidemen, ſhall be ſworn to preſent the offence of drunkenneſs. 4 *J.* *c.* 5. *ſ.* 7.

3. Every perſon who ſhall be drunk, and thereof ſhall be convicted (I K) before one juſtice, or mayor, on view, confeſſion, or oath of one witneſs, ſhall forfeit for the firſt offence 5s. to be paid within one week after conviction, to the churchwardens (L), who ſhall be accountable for the ſame to the uſe of the poor; and if he ſhall refuſe or neglect to pay the ſame as aforeſaid, it ſhall be levied by diſtreſs (M); and if the offender be not able (N) to pay the ſaid ſum of 5s. he ſhall be committed to the ſtocks (O), there to remain by the ſpace of ſix hours. 4 *J.* *c.* 5. *ſ.* 2. 21 *J.* *c.* 7. *ſ.* 1. 3. *Penalty for the firſt offence.*

And if any conſtable, or other inferior officer to whom that ſhall be given in charge by the precept of any mayor or juſtice, do neglect the due correction of the offender, or the due levying of the penalties where diſtreſs may be had; every perſon ſo offending ſhall forfeit 10s. to be levied by diſtreſs, by any other perſon having warrant from any mayor, juſtice, or court, where any ſuch conviction ſhall be, * to be paid to the churchwardens, who ſhall account for the ſame, to the uſe of the poor where the offence ſhall be committed. 4 *J.* *c.* 5. *ſ.* 3. * 42.

4. And if any perſon once convicted of drunkenneſs, ſhall after that again be convicted of the like offence, he ſhall be bounden with two ſureties in a recognizance or obligation of 10l. with condition to be from henceforth of good behaviour. 4 *J.* *c.* 5. *ſ.* 6. 21 *J.* *c.* 7. *ſ.* 3. *Second offence.*

To be of good behaviour] Lord *Hale*, ſpeaking of the ſtatute of 34 *Ed.* 3. *c.* 1. which gave juſtices power to bind malefactors to the good behaviour, generally, without any time limited, ſays, that it is not meant that the ſame ſhall be perpetual, but in the nature of bail, *viz.* to

appear at ſuch a day at their ſeſſions, and in the mean time to be of good behaviour. 2 *H. H.* 136.

Who may inquire thereof.

5. The ſaid offence may alſo be inquired of and preſented before juſtices of aſſize, juſtices of the peace in their ſeſſions, mayors, and in the leet; and thereupon proceſs ſhall be had for the conviction, as upon indictment or preſentment. 4 *J. c.* 5. *ſ.* 5.

In what time.

6. But the offenders ſhall be preſented, indicted or convicted in ſix months 4. *J. c.* 5. *ſ.* 11.

None to be twice puniſhed for the ſame offence.

7. It is alſo provided, that this act ſhall not abridge the eccleſiaſtical juriſdiction. 4 *J. c.* 5. *ſ.* 8.

But when the offender hath been once puniſhed, by any the ways before mentioned, he ſhall not be puniſhed again by any other ways or means. *ſ.* 9.

Alehouſekeeper drunk.

8. If any alehouſekeeper ſhall be convicted of being drunk; he ſhall, beſides the penalties abovementioned, be utterly diſabled to keep any ſuch alehouſe, for the ſpace of three years next enſuing the conviction. 7 *J. c.* 10.

Navy.

9. Every perſon in his majeſty's pay in the navy being guilty of drunkenneſs, ſhall incur ſuch puniſhment as a court martial ſhall think fit to impoſe. 22 *G.* 2. *c.* 33. *Art.* 2.

XV. Detaining goods for the reckoning.

General power of detaining.

1. An innkeeper may detain the perſon of a gueſt who eats, or the horſe which eats, till payment. And this he may do without any agreement for that purpoſe. For men that get their livelihood by entertainment of others, cannot annex ſuch diſobliging condition, that they ſhall retain the party's property in caſe of nonpayment; nor make ſuch diſadvantageous and impudent a ſuppoſition, that they ſhould not be paid. And therefore the law annexes * ſuch a condition, without the expreſs agreement of the parties. *Bac. Abr.* Inns.

* 43.

For it would be hard to oblige him to ſue for every little debt; and a greater hardſhip, that he might not be able to find who was his gueſt. *id.*

Horſe to be detained only for his own meat.

2. But an horſe committed to an innkeeper may be detained only for his own meat, and not for the meat of the gueſt, or of any other horſe; for the chattles in ſuch caſe are only in the cuſtody of the law for the debt that ariſes from the thing itſelf, and not for any other debt due from the ſame party; for the law is open for all ſuch debts, and doth not admit private perſons to take repriſals. *Bac. Abr.* Inns. 1 *Bulſt.* 207.

Reckoning to be in particulars; and veſſels to be ſealed.

3. Alſo, if any innkeeper, alehouſekeeper, victualler, or ſutler, in giving any account or reckoning in writing, or otherwiſe, ſhall refuſe or deny to give in the particular number of quarts or pints, or ſhall ſell in meaſures unmarked; it ſhall not be lawful for him, for default of payment of ſuch reckoning, to detain

any

any goods or other thing, belonging to the perſon or perſons from whom ſuch reckoning ſhall be due, but he ſhall be left to his action at law for the ſame, any cuſtom or uſage to the contrary notwithſtanding. 11 & 12 *W.* c. 15. *ſ.* 2.

4. In like manner if the innkeeper gives credit to the party for that time, and lets him go without payment; then he hath waived the benefit of the cuſtom, and muſt rely on his other agreement. 8 *Mod.* 172. *Goods ſuffered to be taken away, not to be retaken.*

5. An innkeeper that detains a horſe for his meat, cannot uſe him; becauſe he detains him as in cuſtody of the law: and by conſequence, the detention muſt be in the nature of a diſtreſs, which cannot be uſed by the diſtrainer. *Bac. Abr.* Inns. *Goods ſeized, not to be uſed.*

6. But by the cuſtom of *London* and *Exeter*, if a man commit an horſe to an innkeeper, and he eat out his price; the innkeeper may take him as his own; upon the reaſonable appraiſement of four of his neighbours; which was, it ſeems, a cuſtom ariſing from the abundance of traffick with ſtrangers, that could not be known, to charge them with the action. But the innkeeper hath no power to ſell the horſe, by the general cuſtom of the realm. *Bac. Abr.* Inns. *Whether they may be ſold.*

So in the caſe of *Jones* and *Pearle*, *E*, 9 *G.* In trover for three horſes, the defendant pleaded that he kept a publick inn at *Glaſtonbury*, and that the plaintiff was a carrier, and uſed to ſet up his horſes there; and 36l. being due to him for keeping the horſes, which was more than they were worth; he detained and ſold them, as well as he might: * But on demurrer, judgment was given for the plaintiff: an innkeeper having no power to ſell horſes, except by ſpecial cuſtom, as in the city of *London*. And beſides, when the horſes had been once out, the power of detaining them for what was due before did not ſubſiſt at their coming in again. *Str.* 556. * 44

XVI. Goods of a gueſt ſtolen out of an inn.

1. Inns were allowed for the benefit of travellers, who have certain privileges whilſt they are in their journeys, and are in a more peculiar manner protected by the law: it is for this reaſon, that the innkeeper ſhall anſwer for thoſe things which are ſtolen within the inn, though not delivered to him to keep, and though he was not acquainted that the gueſts brought the goods to the inn; for it ſhall be intended to be thro' his negligence, or occaſioned by the fault of him or his ſervants. 8 *Co.* Caley's caſe. *Innkeepers anſwerable for goods ſtolen.*

So if he puts a horſe to paſture, without the direction of his gueſt, and the horſe is ſtolen, he muſt make ſatisfaction. (But otherwiſe, if with his direction.) *id.*

In like manner, if an innkeeper bids his gueſt take the key of his chamber and lock the door, and tells him that he will not take the charge of the goods; yet if they are ſtolen he ſhall be anſwerable: becauſe he is charged by law for all things which come to his inn;

and he cannot diſcharge himſelf by ſuch or the like words. *Dalt. c.* 56. *Blackerby.* 169.

Who ſhall be deemed a gueſt in this reſpect.

2. *Holt* C. J. doubted whether a man is a gueſt by ſetting up his horſe at an inn, though he never went into the inn himſelf; but the other three juſtices held, that ſuch perſon is a gueſt by leaving his horſe, as much as if he had ſtaid himſelf, becauſe the horſe muſt be fed, by which the innkeeper has gain; otherwiſe if he had left a trunk, or a dead thing. 1 *Salk.* 388.

So if a man comes to an inn with a hamper, in which he hath certain goods (to wit, hats, as the caſe was), and departs leaving it with the hoſt, and two days after comes again; whereas in the time of his abſence this was ſtolen; he ſhall not have any action againſt the hoſt, becauſe he was not a gueſt at the time of the ſtealing, and the hoſt had no benefit by the keeping thereof, and therefore ſhall not be charged for the loſs thereof in his abſence. 1 *Roll's Abr.* 2.

If an attorney hires a chamber in an inn for a whole term, the hoſt is not chargeable with a robbery in it, becauſe the party is as it were a leſſee. *Mo.* 877.

* 45. If one comes to an inn, and makes a previous contract for lodging* for a ſet time, and doth not eat or drink there; he is no gueſt, but a lodger, and ſo not under the innkeeper's protection; but if he eats and drinks, or pays for his diet there, it is otherwiſe. 12 *Mod.* 255.

Soldiers billeted are gueſts. *Clayt.* 97.

XVII. Gueſts ſtealing goods.

A gueſt in a common inn, ariſing in the night time, and carrying goods out of his chamber into another room, and from thence to the ſtable, intending to ride away with them, is guilty of felony, altho' there was no treſpaſs in the taking of them (which yet is generally required in caſes of felony.) *Dalt. c.* 40.

NOTE, The univerſities are generally excepted out of theſe acts concerning alehouſes.

A. Information and complaint for ſelling ale without licence; on the 5 *G.* 3. *c.* 46.

Weſtmorland. *BE it remembered, that this ——— day of ——— in the ——— year of the reign of his majeſty king* George *the third that now is,* A. I. *gentleman, in his proper perſon, as well for his ſaid majeſty as for himſelf, exhibiteth to me* J. P. *eſquire, one of his ſaid majeſty's juſtices of the peace in and for the ſaid county, a complaint and information, and thereby informeth me, that on the ——— day of ——— now laſt paſt, and at ſeveral times between the ſaid ——— day of ——— and the time of exhibiting this information and complaint, one* A. O. *of ——— in the county aforeſaid, yeoman, at ——— aforeſaid in the county aforeſaid, did ſell ale and beer, and other exciſable liquors, by retail, without being duly licenſed ſo to do; whereby the ſaid* A. O. *hath forfeited the ſum of* 40*s. together with the coſts and*

and expences of convicting the said A. O. *for the said offence; and that* A. W. *of* ——— *in the said county, yeoman, is a material witness to be examined concerning the premisses: And thereupon the said* A. I. *who as well for his said majesty as for himself exhibiteth this information, prayeth judgment of me the said justice in the premisses, that he may have one moiety of the said sum of* 40s. *and also the costs and expences of such conviction as aforesaid, according to the form of the statute in that case made; and that the said* A. O. *may be summoned to answer* * *the premisses, and the said* A. W. *to testify his knowledge therein.* * 46.

A. I.

Before me the justice aforesaid,

J. P.

B. Summons of a person for selling ale without licence; and also of a witness; on the 5 *G.* 3. *c.* 46.

Westmorland. } To the constable of ——— in the said county.

WHEREAS a complaint and information hath been this day exhibited before me J. P. *esquire, one of his majesty's justices of the peace in and for the said county, by* A. I. *of* ——— *gentleman, setting forth, that on the* ——— *day of* ——— *now last past, and at several times between the said* ——— *day of* ——— *and the time of exhibiting the said information and complaint, one* A. O. *of* ——— *in the county aforesaid, yeoman, at* ——— *aforesaid in the county aforesaid, did sell ale and beer, and other exciseable liquors, by retail, without being duly licensed so to do; and that* A. W. *of* ——— *in the said county, yeoman, is a material witness to be examined concerning the premisses: These are therefore to require you forthwith to summon the same* A. O. *to appear before me at* ——— *in the said county, on* ——— *the* ——— *day of* ——— *at the hour of* ——— *to answer to the matter so complained and informed of against him; and to summon also the said* A. W. *to appear before me at the same time and place to testify his knowledge in the premisses. And be you then there to certify what you shall have done in the execution hereof. Herein fail you not. Given under my hand and seal this* ——— *day of* ——— *in the* ——— *year* ———.

Note, *a separate* summons for a witness, in behalf of either of the parties, may easily be extracted from the premisses, *mutatis mutandis.*

C. Conviction for selling ale without licence; on the 5 *G.* 3. *c.* 46. specially directed by the statute.

Middlesex. *BE it remembered, that on this* ——— *day of* ——— *in the year* ——— A. O. *of* ——— *was duly convicted before me* J. P. *esquire, one of his majesty's justices* * *of the peace for the county of* M. *for selling ale or beer, or other exciseable liquors* (as the case shall be) *without being duly licensed so to do, according to the statutes in such case made and provided, whereby he has forfeited* * 47.

the

the ſum of ——— *this being the firſt, ſecond, or third offence* (as the caſe ſhall be) *beſides the coſts and expences of this conviction; which coſts and expences I the ſaid juſtice of the peace do hereby aſcertain and aſſeſs at the ſum of* ——— *purſuant to the ſtatute in ſuch caſe made and provided. Given under my hand and ſeal, the day and year above written.*

D. Commitment on non-payment of the penalty for ſelling ale without licence; on the 5 G. 3. c. 46.

Weſtmorland. { To the conſtable of ——— in the ſaid county, and to the keeper of his majeſty's gaol at ——— in the ſaid county.

WHEREAS A. O. *of* ——— *in the county aforeſaid, yeoman, was on the* ——— *day of* ——— *duly convicted before me* J. P. *eſquire, one of his ſaid majeſty's juſtices of the peace in and for the ſaid county, for ſelling ale* [*beer, or other exciſeable liquors*, as the caſe ſhall be] *without being duly licenſed ſo to do, according to the ſtatutes in ſuch caſe made and provided; whereby he hath forfeited the ſum of forty ſhillings (this being the firſt offence,) beſides the coſts and expences of his conviction, which expences I have aſcertained and aſſeſſed at the ſum of* ——— *purſuant to the ſtatute in ſuch caſe made: And whereas the ſaid* A. O. *on the ſaid* ——— *day of* ——— *had notice of the ſaid conviction, and hath refuſed or neglected to pay, and hath not paid, the ſaid ſeveral ſums of forty ſhillings and* ———: *I do therefore hereby command you the ſaid conſtable, to apprehend him the ſaid* A. O. *and him to convey to the ſaid gaol at* ——— *aforeſaid, and deliver him to the ſaid keeper thereof, together with this precept: And I do hereby command you the ſaid keeper of the ſaid gaol, to receive into your cuſtody in the ſaid gaol him the ſaid* A. O. *and him there ſafely to keep for the ſpace of one month, unleſs he ſhall ſooner pay the ſaid ſeveral ſums of forty ſhillings and* ———, *and alſo the coſts, charges, and expences of executing the ſaid conviction. Given under my hand and ſeal, the* ——— *day of* ——— *in the year* ———.

The like will do for the ſecond, third, or other ſubſequent offence, *mutatis mutandis.*

E. F.

* 48. E. F. Precept to the high conſtable to iſſue warrants to the petty* conſtables, to ſummon alehouſekeepers to be licenſed; on 5 & 6 Ed. 6. c. 25. 2. G. 2. c. 28. and 26. G. 2. c. 31.

Weſtmorland { To *John Bowneſs*, gentleman, high conſtable of the *Eaſt Ward* within the ſaid county.

IN purſuance of the ſtatutes in that caſe made, theſe are to require you, on ſight hereof, to iſſue out your warrants to all petty conſtables belonging to the ſeveral conſtablewicks within your ſaid ward, in the form

form, or to the effect hereon indorſed. Given under our hands and ſeals the —— day of ———

J. P.
K. P.

Form of the warrant as above directed:

Weſtmorland, East Ward. } To the conſtable of ——

BY virtue of a warrant from his majeſty's juſtices of the peace acting within the ſaid ward to me directed, you are hereby required to give notice to all licenſed inn-keepers and ale-houſekeepers within your conſtablewick, and alſo to all perſons unlicenſed (ſo far as the ſame ſhall come to your knowledge) who do intend to offer themſelves to be licenſed at the next general meeting of the ſaid juſtices for that purpoſe, that they do perſonally appear before the ſaid juſtices at ——— on the ——— day of September *next, at the hour of ——— in the forenoon of the ſame day, to take or renew their licences for the year enſuing; and alſo to give them notice, that every perſon then and there to be licenſed, muſt perſonally enter into a recognizance in the ſum of* 10l. *together with two ſureties in* 5l. *each, or one ſurety in* 10l. *that they will not uſe or ſuffer any unlawful games, and that they will keep good order and rule within their reſpective houſes and other places; and if any ſhall be hindred by ſickneſs, or other reaſonable cauſe to be allowed by the ſaid juſtices, that he muſt procure two ſureties then and there to be bound in like manner in* 10l. *each.*

*And unto ſuch perſons as have not been licenſed for the year preceding, you are further to give notice, that no licence will be granted to any of them, unleſs he ſhall alſo, at the ſame time and place, * produce a certificate under the hands of the miniſter and the major part of the churchwardens and overſeers, or elſe of three or four reputable and ſubſtantial houſeholders of the place where he inhabiteth, ſetting forth that he is of good fame, and of ſober life and converſation.* * 49.

And you are to make a return to the ſaid juſtices, at the ſame time and place, in writing under your hand, containing the names of all ſuch perſons as you ſhall have ſummoned ſo to appear before them as is aforeſaid, together with their dwelling places, and the ſigns by which their houſes are known.

Hereof fail not. Given under my hand at Raiſbeck *in the ſaid county the —— day of ——— in the year of our Lord ———*

John Bowneſs, *high conſtable.*

G. Licence to keep an alehouſe; on the 5 & 6 *Ed.* 6. *c.* 25. 2 *G.* 2. *c.* 28. and 26 *G.* 2. *c.* 31.

Weſtmorland, East Ward. *AT a general meeting of his majeſty's juſtices of the peace for the ſaid county, acting within the diviſion of the* East Ward *aforeſaid in the county aforeſaid holden at ——— in and for the ſaid diviſion, for licenſing perſons to keep common inns and alehouſes the —— day of* September *in the ——— year of the reign*

reign of our ſovereign lord George *the third, of* Great Britain, France, *and* Ireland, *king, defender of the faith, and ſo forth, and in the year of our Lord* ——.

We his majeſty's juſtices of the peace for ſaid county, whoſe hands and ſeals are hereunto ſet (whereof one is of the quorum*) aſſembled at the ſaid general meeting, do allow and licenſe* A. B. *yeoman, at the ſign of* —— *in* ——— *within the diviſion and county aforeſaid, to keep a common alehouſe, or victualling houſe, and to utter and ſell victuals, beer, ale, cyder, and other exciſeable liquors, to be drank in the ſame houſe wherein he now dwelleth, and not elſewhere, for one whole year from the* 29th *day of this preſent month of* September, *and no longer: So as the true aſſize in bread, beer, ale, and other liquors, hereby allowed to be ſold, be duly kept; and no unlawful game or games, drunkenneſs or any other diſorder be ſuffered in his houſe, yard, garden, or backſide; but that good order and rule be maintained and kept therein, according to the laws of this realm in that behalf made. Given under our hands and ſeals the day and year firſt above written.*

If he hath not been licenſed the year before, then theſe words muſt be inſerted,——*A certificate under the hands of* ——— *having been firſt produced unto us, ſetting forth that* * *the ſaid* ——— *is of good fame, and of ſober life and converſation.*

* 50.

But if ſuch perſon hath been licenſed the year before, this certificate is not required; and therefore to inſert the ſame in all licences is abſurd; and, if executed by the juſtices in ſuch form, muſt be in many inſtances not true.

H. Recognizance of an alehouſekeeper; on 5 & 6 *Ed.* 6. *c.* 25. and 26 *G.* 2. *c.* 31.

Weſtmorland. *BE it remembred, that on the* —— *day of* ——— *in the* —— *year of the reign of* ——— A. P. *of* —— *in the county aforeſaid, innkeeper, and* A. S. *of* —— *yeoman, and* B. S. *of* —— *yeoman, perſonally came before us* ——— *eſquires, juſtices of the peace for the ſaid county, and acknowledged themſelves to owe to our ſaid ſovereign lord the king, that is to ſay, the ſaid* A. P. *the ſum of* 10l. *and the ſaid* A. S. *and* B. S. *the ſum of* 5l. *each, of good and lawful money of* Great Britain, *to be made and levied of their goods and chattels, lands, and tenements reſpectively, to the uſe of our ſaid ſovereign lord the king, his heirs and ſucceſſors, if the ſaid* A. P. *ſhall make default in the condition underwritten.*

THE condition of this recognizance is ſuch, that whereas the above-bounden A. P. *is licenſed to keep a common inn and alehouſe for one year from the* 29th *day of this preſent month of* September *in the houſe where he now dwelleth at* ——— *aforeſaid; if he the ſaid* A. P. *ſhall keep and maintain good order and rule, and ſhall ſuffer no diſorders or unlawful games to be uſed in his ſaid houſe, nor in any outhouſe, yard, garden,*

garden, or backſide, thereunto belonging, during the ſaid term, then this recognizance ſhall be void.

Taken and acknowledged the day and year above written, before us.

J. P.
K. P.

* I. Information of drunkenneſs; on the 4 *J.* *c.* 5. and 21. *J.* *c.* 7. * 51.

Weſtmorland. { The information of *A. I.* of ——— in the county aforeſaid, yeoman, exhibited before me *J. P.* eſquire, one of his majeſty's juſtices of the peace for the ſaid county, the ——— day of ——— in the year ——— who on his oath ſaith,

THAT A. O. *of* ——— *in the county aforeſaid, labourer, on the* ——— *day of* ——— *in the year aforeſaid, at the pariſh of* ——— *in the ſaid county, was drunk; contrary to the ſtatutes in ſuch caſe made: And thereupon he the ſaid* A. I. *prayeth that he the ſaid* A. O. *may forfeit the ſum of five ſhillings to the uſe of the poor of the ſaid pariſh, as by the ſaid ſtatutes is required.*

A. I.

Before me

J. P.

K. Summons thereupon,

Weſtmorland. { To the conſtable of ———

FORASMUCH as information upon oath hath been made before J. P. *eſquire, one of his majeſty's juſtices of the peace for the ſaid county, that* A. O. *of* ——— *in the county aforeſaid, labourer, on the* ——— *day of* ——— *in the year* ——— *at the pariſh of* ——— *in the county aforeſaid, was drunk; contrary to the ſtatutes in ſuch caſe made: Theſe are therefore to require you to ſummon the ſaid* A. O. *to appear before me at* ——— *in the ſaid county, on* ——— *the* ——— *day of* ——— *to anſwer unto the ſaid information, and to ſhew cauſe why the penalty of five ſhillings ſhould not be levied on the goods of him the ſaid* A. O. *for the ſaid offence; and be you then there to certify what you ſhall have done in the premiſſes. Given under my hand and ſeal, the* ——— *day of* ——— *in the year* ———.

Note, the juſtice may convict on his own view; and then the information and ſummons are needleſs.

L. Warrant to * the churchwardens (if they are not preſent at the conviction, or the offender makes default by not appearing) to receive the penalty of drunkenneſs; by the 4 *J.* *c.* 5. and 21 *J.* *c.* 7. * 52.

Weſtmorland. { To the churchwardens of the pariſh of ——— in the ſaid county.

FORASMUCH as A. O. *of* ——— *in the county aforeſaid, labourer, is convicted before me* J. P. *eſquire, one of his majeſty's juſtices of the peace for the ſaid county, for that he the ſaid* A. O. *on the* ——— *day of* ——— *in the year* ——— *at the pariſh of* ——— *in the ſaid county, was drunk, contrary to the ſtatutes in ſuch caſe made; whereby he hath forfeited the ſum of five ſhillings, to the uſe of the poor of the ſaid pariſh: Theſe are therefore to require you to demand and receive of and from him the ſaid* A. O. *the ſaid ſum of five ſhillings, to be by you accounted for to the uſe aforeſaid: And if he ſhall refuſe or neglect to pay the ſame, by the ſpace of one week after ſuch demand made; that then you certify to me ſuch refuſal and neglect, to the end that ſuch proceedings may be had thereupon, as to juſtice doth appertain. Given under my hand and ſeal, the* ——— *day of* ——— *in the year* ———.

M. Warrant to levy the penalty of drunkenneſs on non-payment; by 4 *J. c.* 5. and 21 *J. c.* 7.

Weſtmorland. { To the conſtable of ——— in the ſaid county.

WHEREAS A. O. *of* ——— *in the pariſh of* ——— *in the county aforeſaid, labourer, was on the* ——— *day of* ——— *convicted before me* ——— *one of his majeſty's juſtices of the peace for the ſaid county, for that he the ſaid* A. O. *was on the* ——— *day of* ——— *drunk, at* ——— *aforeſaid, in the pariſh and county aforeſaid, by which he hath forfeited the ſum of* 5s. *And whereas I the ſaid* ——— *did iſſue my warrant on the* ——— *day of* ——— *to the churchwardens of the pariſh of* ——— *aforeſaid, to demand and receive the ſaid ſum of* 5s. *of and from the ſaid* A. O. *And whereas it duly appears to me, as well on the oath of* C. W. *churchwarden of the pariſh of* ——— *aforeſaid, as otherwiſe, that they the ſaid churchwardens did on the* ——— *day of* ——— *demand the ſaid ſum of* 5s. *of and from the ſaid* A. O. *but that he the ſaid* A. O. *hath neglected to pay the ſame as aforeſaid, and that the ſame is not yet paid: Theſe are therefore to*
53. *command* you forthwith to levy the ſaid ſum by diſtraining the goods of him the ſaid* A. O. *And if within the ſpace of* [ſix] *days next after ſuch diſtreſs by you taken, the ſaid ſum, together with reaſonable charges for taking and keeping the ſaid diſtreſs, ſhall not be paid, that then you do ſell the ſaid goods ſo by you diſtrained as aforeſaid, and out of the money ariſing by ſuch ſale, that you do pay the ſaid ſum of* 5s. *to the church-wardens of the ſaid pariſh, for the uſe of the poor of the ſaid pariſh, rendring to him the ſaid* A. O. *the overplus upon demand, the neceſſary charges of taking, keeping, and ſelling the ſaid diſtreſs being firſt deducted. And if the ſaid* A. O. *be not able to pay the ſaid ſum of* 5s. *and ſufficient diſtreſs cannot be found whereof to levy the ſaid ſum, that you certify the ſame to me, together with the return of this warrant. Given under my hand and ſeal this* ——— *day of* ———.

N. Certificate

N. Certificate by the conſtable of want of diſtreſs.

Weſtmorland. A. C. *conſtable of* ——— *in the ſaid county, maketh oath this* ——— *day of* ——— *in the year* ——— *before me the juſtice within-mentioned, that he hath made diligent ſearch for, but doth not know of, nor can find, any goods of the within-mentioned* A. O. *whereof to levy the within ſum of five ſhillings.*

A. C.

Before me the ſaid juſtice,
J. P.

O. Commitment to the ſtocks for drunkenneſs, on inability to pay the penalty; on 4 *J. c.* 5. and 21 *J. c.* 7.

Weſtmorland. } To the conſtable of ——— in the ſaid county.

WHEREAS A. O. *of* ——— *in the ſaid county, labourer, was on the* ——— *day of* ——— *convicted before me* ——— *one of his majeſty's juſtices of the peace for the ſaid county, for that he the ſaid* A. O. *was on the* ——— *day of* ——— *drunk at* ——— *aforeſaid, in the pariſh of* ——— *in the ſaid county, whereby he hath forfeited the ſum of* 5s. *And whereas it duly appears to me, that the ſaid* A. O. *is not able to pay the ſaid ſum of* 5s. *Theſe are therefore to require you in his majeſty's name, to ſet him the ſaid* A. O. *in the ſtocks, there to remain for the ſpace of ſix hours. Given under my hand and ſeal the* ——— *day of* ———.

*ALMANACK.

* 54.

BY the 9. *Ann. c.* 23. & 30 *G.* 2. *c.* 19. For every ſheet almanack, for one year or leſs, printed on one ſide only, ſhall be paid a ſtamp duty of 2d. For every other almanack for one year, 4d. If for more than one year, then 2d. for each year, but not ſo as to charge any for more than if made for three years only.

And by 21 *G.* 3. *c.* 56. an additional duty of 2d. is laid on ſheet almanacks, whereby to advance the ſame to the other almanacks not being printed on one ſide only, reciting that whereas the power of granting a liberty to print almanacks and other books was heretofore ſuppoſed to be an inherent right in the crown; and whereas the crown hath by different charters granted to the univerſities of Oxford and Cambridge, among other things, the privilege of printing almanacks; and whereas the univerſities did demiſe to the company of Stationers of the city of London, their privileges of printing and vending almanacks and calendars, and have received an annual ſum of 1000l as a conſideration for ſuch privilege; and whereas the money ſo received

by them hath been laid out in promoting different branches of literature and ſcience, to the great increaſe of religion and learning, and the general benefit and advantage of theſe realms; and whereas the privilege of printing almanacks has been by a late deciſion at law found to be a common right over which the crown had no controul, and conſequently the univerſities had no power to demiſe the ſame to any particular perſon or body of men, whereby the payments ſo made to them by the company of Stationers have been diſcontinued: therefore out of the additional duties impoſed by this act, there ſhall be paid to each of the ſaid univerſities yearly the ſum of 500l. clear of all deductions. *ſ.* 10.

By the 10 *Ann. c.* 19. All books and pamphlets ſerving chiefly to the purpoſe of an almanack, ſhall be charged as almanacks.

But where an almanack contains more than one ſheet, one ſheet only need to be ſtamped. 9 *Ann. c.* 23. *ſ.* 26.

Every almanack ſhall be ſo printed that ſome part of the print be upon the ſtamp. 21 *G.* 3. *c.* 56. *ſ.* 5.

If any perſon ſhall expoſe to ſale any almanack unſtamped; he ſhall, on conviction before one juſtice on the oath of one witneſs, be committed to the houſe of correction not exceeding three months: * And any perſon may apprehend and carry him before ſuch juſtice; and on producing a certificate of the conviction under the hand of ſuch juſtice, he ſhall have a reward of 20s. to be paid by the receiver general of the ſtamp duties. 16 *G.* 2. *c.* 26. *ſ.* 5. 30 *G.* 2. *c.* 19. *ſ.* 26.

* 55.

ANNUITIES.

BY ſeveral acts, oath of an annuitant's life is to be made before a juſtice of the peace, who ſhall give a certificate thereof, in order to intitle ſuch perſon to receive his annuity.

Apothecary. See *PHYSICIANS.*

APPEAL.

1. THIS word has two ſignifications in law; the one is, removing a cauſe from an inferior court, or judge, to a ſuperior; as from one or more juſtices, to the quarter ſeſſions. *Appeal, what.*

The other kind of appeal (which is the ſubject of this title) is a proſecution againſt a ſuppoſed offender, by the party's own private action; proſecuting alſo for the crown, in reſpect of the offence againſt the publick. 2 *Haw.* 155.

2. An appeal is brought in three caſes; 1. By a man for a wrong to his anceſtor. 2. By a wife for the death of her huſband. 3. For wrong done to the appellants themſelves, as in the caſe of robbery, rape, or maihem. But appeals are now diſuſed, on account of the nicety of the pleadings, and the charge of the proſecution; *In what caſes an appeal may be brought.*

secution; and the method of indictment is generally taken. *Wood, b.* 4. *c.* 5.

Within what time an appeal may be brought.

3. A person acquitted on an indictment of murder, shall not be set at liberty, but shall be recommitted, or bailed, till the year and day be past; within which time an appeal may be brought. 3 *H.* 7. *c.* 1.

Appeal brought before the sheriff and coroner.

4. It is certain that an appeal may be commenced before the sheriff and coroner, and removed from them into the king's bench by certiorari. 2 *Haw.* 156.

Before justices of the peace.

5. And it seems to be holden in *Fitzherbert*'s abridgment, that justices of the peace have power to receive appeals; * but there is much greater authority for the contrary opinion. 2 *Haw.* 156. * 56.

Persons acquitted on appeal.

6. If the person appealed shall be acquitted, the appellor shall be imprisoned for a year, and restore damages to the party, and be grievously fined to the king. 13 *Ed.* 1. *st.* 1. *c.* 12. That is, if the appeal shall appear to the court to have been malicious. 2 *Haw.* 198.

Pardon.

7. Forasmuch as an appeal is the suit of the party, as well as of the king, hence it is that the king cannot pardon an offender found guilty upon an appeal, as he may when found guilty upon an indictment: for in such case he can only pardon for himself, but not for the party. 2 *Haw.* 155.

APPLES AND PEARS.

WHEREAS apples and pears are frequently sold by measure, commonly called water-measure, the contents whereof are very uncertain; therefore for the future, the said measure shall be round, and in diameter eighteen inches and an half within the hoop, and eight inches deep; and so in proportion: And every measure, commonly called water-measure, by which apples and pears are sold, shall be heaped as usually: And whosoever shall sell or buy any apples or pears by any other measure, shall forfeit 10s. half to the informer, and half to the poor, on conviction on the oath of one witness, before one justice (or mayor), to be levied by the petty constable by warrant of the said justice, by distress and sale. 1 *Ann. st.* 1. *c.* 15. *s.* 1.

But this shall not extend to any measure sealed and allowed by the fruiterers company in London. *s.* 2.

Concerning the robbing of orchards, see title *WOOD.*

Apprehending Offenders. See *ARREST.*

APPRENTICES.

Concerning the ſettlement of apprentices. See title *POOR*.

I. Who may take apprentices.
II. Who are compellable to be bound apprentices.
57. * *III. Binding.*
IV. Binding of poor apprentices.
V. Money given to bind out poor apprentices.
VI. Binding poor apprentices to the ſea ſervice.
VII. Differences between the maſter and apprentice.
VIII. Apprentice ſtealing his maſter's goods.
IX. Inticing away an apprentice.
X. Aſſigning apprentices.
XI. Maſter dying.
XII. Apprentices ſetting up their trades.

I. Who may take apprentices.

In huſbandry. 1. EVERY perſon being an houſeholder, and having and uſing half a plough-land in tillage, may take an apprentice above the age of ten years, and under eighteen, to ſerve in huſbandry till twenty-one at the leaſt, or till twenty-four as the parties can agree. 5 *El. c.* 4. *ſ.* 25.

In trades in towns corporate. 2. Every perſon being an houſeholder, and twenty-four years old at the leaſt, dwelling in any city or town corporate, and exerciſing any art, miſtery, or manual occupation there, may retain the ſon of a freeman, not occupying huſbandry, nor being a labourer, and inhabiting in the ſame, or in any other city or town corporate, to ſerve and be bound as an apprentice, after the cuſtom and order of the city of *London*, for ſeven years at the leaſt, ſo as ſuch apprenticeſhip do not expire before the apprentice ſhall be twenty-four years of age. 5 *El. c.* 4. *ſ.* 26.

But no perſon dwelling in any city or town corporate, being a merchant, mercer, draper, goldſmith, ironmonger, imbroiderer, or clothier, ſhall take any apprentice except he be his ſon, or elſe that the father and mother of ſuch apprentices ſhall have an eſtate of inheritance or freehold of 40s. a year, to be certified under the hands and ſeals of three juſtices where the lands lie, to the mayor of that city or town corporate, and to be inrolled among the records there. *ſ.* 27.

And the reaſon of this (Mr. *Dalton* ſays) ſeems to be, for that ſuch as are to be bound apprentices in towns corporate, if their parents be of a competent livelihood, then their maſters ſhall be not only better ſecured, but ſuch apprentices alſo in likelihood, ſhall have the better means to ſet up their trades after their times expired. And concerning
* 58. ſuch, whoſe parents have not 40s. a year, they * are fitter to be bound apprentices to huſbandry, and the like in the country. *Dalt. c.* 58.

But by reaſon of the great alteration in the value of money ſince that time, this proviſion is become of little uſe; for an eſtate of 40s. a year then, was equal to more than 10l. a year now.

But the citizens of *London* and *Norwich* may take and have apprentices, as before this act. *ſ.* 40.

3. Every

3. Every perſon being an houſholder, and twenty-four years old at the leaſt, and not occupying huſbandry, nor being a labourer, dwelling in any market town not corporate, and exerciſing any art, miſtery, or manual occupation, may have to apprentice the child or children of any other artificer, not occupying huſbandry, nor being a labourer, inhabiting in the ſame or any other ſuch market town in the ſame ſhire. 5 *El. c.* 4. *ſ.* 28. *In trades in market towns not corporate.*

But no perſon dwelling in any ſuch market town, being a merchant, mercer, draper, goldſmith, ironmonger, imbroiderer, or clothier, ſhall take any apprentice except he be his ſon, or elſe that his father and mother ſhall have an eſtate of inheritance or freehold of 3l. a year, to be certified under the hands and ſeals of three juſtices of the ſhire where the lands lie, to the head officer of ſuch market town where ſuch apprentice ſhall be taken, there to be inrolled of record. *ſ.* 29.

4. Any perſon uſing the art of a ſmith, wheelwright, ploughwright, millwright, carpenter, rough maſon, plaiſterer, ſawyer, limeburner, brickmaker, bricklayer, tyler, ſlater, helier, tyle-maker, linen-weaver, turner, cooper, miller, earthen potter, woollen weaver weaving houſhold cloth only, fuller, otherwiſe called tucker or walker, burner of oare and woad aſhes, thatcher or ſhingler, whereſoever he ſhall dwell, may take the ſon of any perſon as apprentice, albeit his parents have no land. 5 *El. c.* 4. *ſ.* 30. *In any place.*

5. Every owner of a ſhip or veſſel, and every houſholder exerciſing the trade of the ſeas by fiſhing or otherwiſe, and every gunner commonly called a canoneer, and every ſhipwright may take apprentices for ten years or under, and every apprentice ſo taken, being above ſeven years of age, ſhall be by the ſame covenants bound, ordered and uſed to all intents, according to the cuſtom of *London*, ſo that the covenant or bond of apprenticeſhip be made by writing indented, and inrolled in the town where the apprentice ſhall be inhabiting, if it be a town corporate; if not, then in the next town corporate: For * which inrollment ſhall be paid not above 12d. 5 *El. c.* 5. *ſ.* 12. *Seamen.* * 59.

6. Every perſon that ſhall have three apprentices in any the crafts of a clothmaker, fuller, ſheerman, weaver, taylor, or ſhoemaker, ſhall keep one journeyman; and for every other apprentice above three one other journeyman, on pain of 10l. half to the king, and half to him that ſhall ſue in the ſeſſions or other court of record; or if it is in a town corporate, then to be applied as by the charter. 5 *El. c.* 4. *ſ.* 33. *Number reſtrained.*

No hatmaker ſhall have above two apprentices at one time, nor thoſe for any leſs term than ſeven years, on pain of 5l. a month, half to the king, and half to him that ſhall ſue in any court of record: But this not to extend to his own ſon, in his own houſe, ſo as he be bound by indenture for ſeven years, and his term not to expire before he be twenty-two years of age. 1 *J. c.* 17. *ſ.* 3, 5.

Weavers of ſtuffs in *Norfolk* and *Norwich*, that ſhall employ two apprentices, ſhall alſo employ two journeymen; and no maſter ſhall

have above two apprentices, or any week boy to weave in the ſaid trade; on pain of 5l. a month to the king. 13 & 14 *C.* 2. *c.* 5. *ſ.* 18.

II. Who are compellable to be bound apprentices.

Who ſhall be bound. 1. If any perſon ſhall be required by any houſholder, uſing half a plowland at leaſt in tillage, to be an apprentice and to ſerve in huſbandry, or in any other art, miſtery, or ſcience before expreſſed, and ſhall refuſe ſo to do, then on complaint of ſuch houſekeeper to one juſtice (or head officer) he ſhall ſend for the perſon refuſing; and if he ſhall think the ſaid perſon meet to ſerve, and ſuch perſon refuſe to be bound, he may commit him to ward, there to remain until he be contented, and will be bound. 5 *El. c.* 4. *ſ.* 35.

At what age. 2. But no perſon ſhall be bound to enter into any apprenticeſhip, other than ſuch as be under the age of twenty one years. 5 *El. c.* 4. *ſ.* 46.

Upon the whole, the aforeſaid directions about the value of the parent's eſtate, and ſuch like, are become entirely obſolete, and of no uſe, and therefore had better be repealed. The reſtrictions were originally intended (as appears by the ſtatute, 9 *H.* 4. *c.* 17.) for the encouragement of huſbandry, by reaſon of the ſcarcity of labourers in ancient time. And this ſtatute of the 5 *Eliz.* * is only a re-enacting, as it were, of former ſtatutes; and expreſſeth, that any perſon being an houſholder may take apprentice the ſon of any freeman, *not occupying huſbandry, nor being a labourer.*

* 60.

III. Binding.

Binding to be by deed. 1. One cannot be bound an apprentice without deed. 1 *Salk.* 68.

And indented. 2. And by the 5 *El. c.* 4. it muſt be by deed indented. *ſ.* 25.

M. 1 *G.* 2. *Smith* and *Birch.* An action was brought againſt the defendant for inticing away and detaining the plaintiff's apprentice, who had agreed by writing to ſerve the plaintiff for ſeven years. Upon evidence it appeared, that the ſtyle of the writing began, *This indenture*, &c. but in fact the parchment was not indented, but was a deed poll. On exception taken to the deed, it was inſiſted that the young man was not an apprentice, becauſe he was not bound by an indenture. An infant can be bound no other way than as the ſtatute of 5 *El.* directs, which is by indenture, and nothing can make this good. The deed cannot now be indented, for that would be a forgery. Therefore unleſs the plaintiff ſhews the apprentice to be of full age at the time of ſigning ſuch deed, he cannot be accounted his apprentice and by conſequence no action can lie for detaining the apprentice; neither can the plaintiff prove him to be his ſervant by his deed, for he has declared for an apprentice, and muſt prove him ſo to be. Therefore the plaintiff was nonſuited. 1 *Seſſ. Ca.* 222.

But with reſpect to ſettlements, it is enacted, by the 31 *G.* 2. *c.* 11. that

that the apprentice may gain a ſettlement under ſuch writing, altho' it ſhall not be indented.

3. And an apprentice muſt be retained by the name of an apprentice expreſsly, otherwiſe he is no apprentice, tho' he be bound. *Dalt. c.* 58. *And by the name of an apprentice.*

4. And all indentures, covenants, promiſes, and bargains, for having or taking apprentices otherwiſe than by the ſtatute of 5 *El.* ſhall be clearly void in the law to all intents and purpoſes; and every perſon that ſhall take any apprentice contrary to the ſaid act, ſhall forfeit 10l. half to the king, and half to him that ſhall ſue in the ſeſſions, or other court of record; or if it is in a town corporate, then to the uſe of ſuch town as by the charter. 5 *El. c.* 4. *ſ.* 41. *Binding otherwiſe void.*

5. By the ſeveral ſtamp acts, the binding (except it be of pariſh apprentices) ſhall be on a 6s. ſtamp; and the ſame ſhall not be given in evidence in any court till it be ſtamped, and the duties paid. *Stamp.*

* 6. And by the 8 *Ann. c.* 9. Beſide the ſaid ſtamps and duties, there ſhall be paid the duty of 6d. for every 20s. of every ſum of 50l. or under; and the duty of 1s. for every 20s. of every ſum above 50l. given with any apprentice; and proportionably for greater or leſſer ſums; to be paid by the maſter. *ſ.* 32. *Additional ſtamp.* * 61.

And where any thing, not being money, ſhall be given with ſuch apprentice, the duties ſhall be anſwered for the value thereof. *ſ.* 45.

But this ſhall not extend to any apprentice, put out at the common charge of any pariſh or townſhip, or out of any publick charity. *ſ.* 40.

And the full ſum ſhall be inſerted in the indenture in words at length, and ſhall bear date on the day of the execution thereof; on pain that the maſter ſhall forfeit double, half to the king, and half with full coſts to him that ſhall ſue. *ſ.* 35.

And no ſuch indenture ſhall be given in evidence in any ſuit to be brought by any the parties thereunto, unleſs ſuch party on whoſe behalf the ſame ſhall be given in evidence, do firſt make oath, that to the beſt of his knowledge, the ſum therein inſerted was really and truly all that was directly or indirectly to be given with ſuch apprentice. *ſ.* 43.

The ſaid indentures, within the bills, ſhall be brought to the head office to be ſtamped with a ſtamp for that purpoſe, and the duties paid within one month after date. *ſ.* 36.

And elſewhere ſhall be brought either to the head office within the bills, or to a collector of the ſtamp duties out of the ſaid limits, in two months after date, and the duties thereupon ſhall be paid, and the indenture ſtamped, if it be at the ſaid head office; otherwiſe ſuch collector ſhall indorſe on the indenture, a receipt for the duties in words at length, and ſubſcribe his name thereto. *ſ.* 37.

And if it is within 50 miles of the limits of the bills of mortality, the indenture ſhall within three months after date, and elſewhere within ſix months, be brought to the head office to be ſtamped. *ſ.* 38.

And all ſuch indentures wherein ſhall not be inſerted the full ſum directly or indirectly given, or whereupon the duties ſhall not be paid, or which ſhall not be ſtamped within the time limited, ſhall be void, and

not available in any court or place, or to any purpoſe whatſoever, and the apprentice ſhall be incapable of exerciſing the ſaid trade. *ſ.* 39.

Moreover, by the 9 *Ann. c.* 21. If the maſter ſhall neglect to pay the duties within the time limited, he ſhall * forfeit 50l. half to the king, and half with full coſts to him who ſhall ſue. *ſ.* 66.

* 62.

And by the 18 *G.* 2. *c.* 22. If he ſhall neglect to pay the ſame as aforeſaid, he ſhall, beſides all other penalties, forfeit double duty. *ſ.* 23, 24.

And by the 20 *G.* 2. *c.* 45. If any maſter, having forfeited the double duty, ſhall pay the ſame, and tender the indenture to be ſtamped, within two years after the determination of the apprenticeſhip, and before ſuit hath been commenced for the penalties, the indenture ſhall be valid, and the penalties diſcharged. *ſ.* 5.

And if the maſter ſhall have forfeited the double duty, the apprentice ſhall in the preſence of, or by writing under his hand ſigned in the preſence of one witneſs, require his maſter to pay the ſame, and the maſter ſhall not do it in three months, and ſuch apprentice ſhall at any time within two years after the determination of his apprenticeſhip, pay the double duty, he may in three months after ſuch payment demand of his maſter double the ſum contracted for in the indenture, and if not paid in three months after, may recover the ſame by action at law, with full coſts. And the apprentice immediately after payment of the ſaid double duties (if his apprenticeſhip ſhall not be then expired) and ſignifying by writing under his hand, that he deſires to be diſcharged from his apprenticeſhip, ſhall be diſcharged accordingly, and ſhall have the ſame benefit of the time he hath ſerved as he would have had in caſe he had been aſſigned, or turned over to a new maſter. *ſ.* 6, 7.

And where any proſecution ſhall be commenced againſt the maſter for the penalties, if the apprentice ſhall pay the double duty at any time in two years after the end of his apprenticeſhip, he may thereupon exerciſe his trade, and the indenture ſhall be valid, and may be given in evidence. *ſ.* 8.

Finally, by the 5 *G.* 3. *c.* 46. Every chamberlain and other proper officer of every city and corporate town, and company, where any clerk or apprentice or ſervant obtains his freedom by ſervitude, ſhall enter in a book to be kept for that purpoſe, the names of all ſuch clerks, apprentices, and ſervants, as ſhall be put out within the juriſdiction of ſuch city or town corporate, and alſo the names and places of abode of the maſters or miſtreſſes, and of the ſums of money, [but it is not ſaid, *or other things equivalent*] given or contracted for, and the trade or profeſſion which they are to learn; and the date of the indentures: on pain * of 20l. half to the king, and half to him that ſhall ſue in any court of record, with full coſts. *ſ.* 18, 41.

* 63.

And all printed indentures ſhall have the following memorandum printed under the ſame; *viz.* "The indenture, covenant, article, or "contract, muſt bear date the day it is executed; and what money "or other thing is given or contracted for with the clerk or appren"tice, muſt be inſerted in words at length; and the duty paid to the "ſtamp office, if in *London*, or within the weekly bills of mortality, "within one month after the execution, and if in the country, and "out of the ſaid bills of mortality, within two months, to a diſtri-

"butor,

" butor of the ſtamps or his ſubſtitute; otherwiſe the indenture will " be void, the maſter or miſtreſs forfeit 50l. and another penalty, and " the apprentice be diſabled to follow his trade, or to be made free." And if any printer, ſtationer, or other perſon, ſhall ſell or cauſe to be ſold any ſuch indenture, without ſuch memorandum being printed under the ſame; he ſhall forfeit 10l. in like manner. *ſ.* 19.

Note, Until of late years, there was generally an indemnity from time to time, in ſome act of parliament, for relief of perſons who had omitted to pay the ſaid duties, or to inſert the ſaid ſums in words at length; provided they paid the duties, and tendred the indentures to be ſtamped, within a time therein limited. The laſt of which acts was the 9 *G.* 3. *c.* 37. Since which time, there hath been a clauſe in ſome act almoſt every year, giving further time to provide admiſſions of officers in corporations duly ſtamped, and to file affidavits of the execution of the indentures of clerks to attorneys and ſolicitors; but this, concerning the additional ſtamp for money given with the apprentice, hath (either thro' deſign or inadvertency) never been revived.

7. It ſeems clearly agreed, that by the common law infants, or perſons under the age of 21 years, cannot bind themſelves apprentices, in ſuch a manner as to intitle their maſters to an action of covenant, or other action, for departing the ſervice, or other branches of their indentures: which makes it neceſſary, according to the uſual practice, to get ſome of their friends to be bound for the faithful diſcharge of their offices, according to the terms agreed on. *Bac. Abr.* Maſter and ſervant. *Infant bound tho' under age.*

But by the ſtatute of 5 *El. c.* 4. Foraſmuch as there hath been ſome doubt, whether any perſon under 21 years of age, and bound to ſerve as an apprentice, in any other place than the city of *London*, ſhall be bound, accepted, and * taken as an apprentice; it is enacted, that every ſuch perſon who ſhall be bound by indenture, to ſerve as an apprentice, in any art, ſcience, occupation, or labour, according to this ſtatute, albeit he be within the age of 21 years, ſhall be bound as amply to every intent, as if he were of full age at the time of making the indentures. *ſ.* 42, 43. * 64.

But this is to be underſtood of a compulſion by the means preſcribed by the ſtatute; for altho' an infant may voluntarily bind himſelf apprentice, and if he continue apprentice for ſeven years, he may have the benefit to uſe his trade; yet neither at the common law, nor by any words of this ſtatute, a covenant or obligation of an infant for his apprenticeſhip ſhall bind him, but if he miſbehave himſelf, the maſter may correct him in his ſervice, or complain to a juſtice to have him puniſhed, according to the ſtatute. But no remedy lieth againſt an infant upon ſuch covenant. *Cro. Car.* 179.

T. 17 *G.* 3. *K.* and *Evered.* Two juſtices committed *Robert Colleball* from running away from his maſter; the caſe was, he had been bound an apprentice when an infant for 6 years by indenture, and being now of age ran away, alledging afterwards that he did ſo with an intent to avoid the apprenticeſhip made when he was an infant, and to his prejudice: he had run away twice before. Two objections were taken; firſt, that the binding was only for *ſix* years, and the

5 *Eliz.* requires it to be for 7; the other was, that an infant could make no contract but such as was voidable, though for his benefit; and *K.* v. *St. Nicholas* in *Ipswich* was cited, where it was adjudged, that such an indenture was voidable by the parties; that in the present case, the apprentice had done every thing in his power to avoid the indenture, having left his master, and said he would live with him no longer. In answer thereto, it was insisted, that the apprentice who had submitted to the indenture as long as he had benefit from it, and till he had learned his trade, should not be permitted to desert his service as soon as he became useful in it; but that the contract at the time of its commencement, which was during infancy, (the time when almost all apprenticeships are entered into), was beneficial to the infant, and might legally be made, and therefore could not be abandoned. Lord *Mansfield:* it has been adjudged that an infant may bind himself for his own benefit, and it is settled in the case in 2 *Str.* 1066. S. C. that a binding for 4 years gives a settlement.—*Aston. J.* supposing the indentures voidable, I cannot conceive that the apprentice's running
* 65. away * can avoid them; had he served regularly, and during such service declared his intention to depart, it might have been different; here he would make use of his offence in order to avoid the punishment that attends it; but it is too late to do it before a justice when charged with a crime. *Willes* and *Ashhurst J.* agreed. *Cal. Cas.* 26.

But if his father, or other person, doth covenant for him; such covenant shall bind the father, or such other person: as in the case of *Whitley* and *Loftus*, *M.* 10 *G.* 2. In the indenture of apprenticeship, the father covenants to pay the apprenticeship money; the son covenants to account for his master's goods; and in the conclusion, the father and son each bind themselves for the true performance of all covenants and agreements therein. By the court: The end of binding the father was to answer wrongs done by the son, and he must answer for any; and the covenant that each did bind himself must be so, where the son is bound to perform the thing for which the covenant was made; and this clause is usually inserted, that the covenants may be taken distributively, to wit, that each of the covenantors should perform his part; and this makes the covenant of the son bind the father, who covenanted for him as well as for himself. 8 *Mod.* 190.

So in the case of *Branch* and *Ewington*, *M.* 21 *G.* 3. On an action of covenant by the master against the father of the apprentice, the indenture was in the common form of the statute, the master covenanting to find the apprentice meat and lodging, the father to find him cloaths and washing, and the apprentice that he would serve faithfully; and for the true performance of all and every the said covenants; each of the said parties bound himself to the other. The breach assigned was, that the apprentice had absented himself from the service.—For the father it was contended, that the parties were only bound for the express covenants which they had severally entered into. That it would be absurd to construe the general words so as to render the father liable for breaches of such of the covenants as were to be performed only by the son. The same construction would render the father liable to the son, or the son to the father, for those which the master was to perform. In all covenants the intention is to govern. The master has other remedies besides an action of covenant against the apprentice if

he

he abſent himſelf: He may, by application to the juſtices, have him puniſhed under the ſtatute of *Elizabeth*; or if he wants compenſation for the loſs of ſervice, he may compel him to make it up by ſubſequent * ſervice under 6 *G.* 3. *c.* 25.——Lord Mansfield ſtopped the counſel who was to have argued on the other ſide, and ſaid, nothing was clearer than that the father was bound for the performance of the covenants by the ſon. *Douglas.* 500. * 66.

And as an infant may be bound by indenture, ſo the apprenticeſhip may be *determined* by conſent of all the parties concerned; which, in the caſe of pariſh poor children, includes the pariſh officers; in other caſes, the father (or guardian), maſter, and infant. *Burrow's Settlement Caſes*, 562, 766: *K.* v. *Juſtices of Devonſhire.*

Where a maſter receives money of an apprentice of full age to vacate his indentures, the relation is diſſolved, though the indentures remain uncancelled. *T.* 17 *G.* 3. *Cal. Caſ.* 32.

But a covenant between the maſter and a third perſon, the infant not being party, maketh not an apprenticeſhip. 2 *Salk.* 479. *K.* v. *Inhabitants of Fleet.*

If an apprentice is bound, it is not neceſſary to the validity of his indenture, that the maſter ſhould ſign a counterpart. *T.* 17 *G.* 3. *Cal. Caſ.* 31. This was the caſe of a poor apprentice.

IV. Binding of poor apprentices.

Power to bind.

1. The churchwardens and overſeers, or the greater part of them, by the aſſent of two juſtices (1 *Q.*) may bind (A) any ſuch children, whoſe parents they ſhall judge not able to maintain them, to be apprentices where they ſhall ſee convenient, till ſuch man child ſhall come to the age of 21 (18 *G.* 3. *c.* 47.), and ſuch woman child to the age of 21 or marriage; the ſame to be as effectual to all purpoſes, as if ſuch child were of full age, and by indenture of covenant bound him or herſelf. 43 *El. c.* 2. *ſ.* 5.

Power to take.

2. And all perſons, to whom the overſeers ſhall by the 43 *El.* bind any children apprentices, may take and keep them as apprentices. 21 *J. c.* 28. 3 *C. c.* 4. *ſ.* 22.

Indenture to be ſtamped.

3. By the ſeveral ſtamp acts, the indenture muſt be on a ſixpenny ſtamped piece of paper or parchment; but is exempted from the additional ſtamps and duties for money given with the apprentice.

Perſons refuſing to take.

4. And where any poor child ſhall be appointed to be bound apprentice by the 43 *El.* the perſon to whom he is appointed to be bound, ſhall receive and provide for him, and alſo execute the other part of the indentures; and if he ſhall refuſe ſo to do, oath being thereof made by one of * the churchwardens or overſeers, before two juſtices, he ſhall forfeit 10*l.* by diſtreſs and ſale, by warrant [B] of ſuch juſtices, to the uſe of the poor of the pariſh or place where the offence was committed; ſaving always to the perſon to whom any poor child ſhall be appointed to be bound apprentice, if he ſhall think himſelf aggrieved thereby, * 67.

thereby, his appeal to the next ſeſſions, whoſe order therein ſhall be final. 8 & 9 *W. c.* 30. *ſ.* 5.

And as the churchwardens and overſeers have power to place out poor children, therefore they are proper judges of perſons who are fit to be their maſters; and thoſe are, all perſons, who by their profeſſion or manner of living, have occaſion to keep ſervants; but the ſame are to be approved of by the juſtices, and if ſuch maſter is diſſatisfied. he may appeal to the ſeſſions. *Dalt. c.* 58.

T. 13 *W. Minchamp's* caſe. Two juſtices bound an apprentice to a *merchant:* He appealed to the ſeſſions, and the order was diſcharged. And now the court, on conſideration of the matter, confirmed the order of ſeſſions; becauſe the act having made perſons compellable to take apprentices, and given an appeal to the ſeſſions, it was in the diſcretion of the juſtices at ſeſſions to determine, whether it was or was not fitting to put an apprentice upon any one; and therefore the court would not diſturb what the ſeſſions had done, but confirmed the order. 2 *Salk.* 491.

M. 12 *G.* 3. *K.* and *Botley.* The pariſh officers of *Botley* appointed an apprentice to be bound to *Edward Clowerley*; who appealed to the ſeſſions. The ſeſſions diſcharge the appointment, and ſtate the caſe ſpecially: That it appears to them upon the evidence, that *Edward Clowerley* reſides in the pariſh of *Hound*, but is owner and occupier of an eſtate in the pariſh of *Botley*, of the yearly value of 30*l.* upon which there is an houſe inhabited by a weekly labourer of the ſaid *Edward* for the better managing the farm: That the ſaid *Edward* did not reſide or lodge in the ſaid pariſh of *Botley*, but paid church and poor rates for the premiſes: That a very conſiderable part of the lands of *Botley* is occupied by perſons reſiding in other pariſhes. —In ſupport of the order of ſeſſions, it was contended, that the ſeſſions have a diſcretionary power to judge of the fitneſs or unfitneſs of binding apprentices to particular perſons; and having by their determination declared, that *Clowerley* ought to be relieved from the apprentice, that had determined the queſtion, and the court could not entertain any queſtion of law about it. It was ſuggeſted, that the
* 68. only queſtion agitated at the ſeſſions and intended * to be referred to this court was, whether occupiers of land, not living within the pariſh where the land lies, are bound by law to take apprentices.—And it not appearing in the ſtate of the caſe, whether the ſeſſions had determined on the unfitneſs of that particular perſon, or on the point of law in general, of his not being liable in reſpect of his living out of the pariſh, lord *Mansfield* ſaid that there was no coming at the point on that ſtate of the caſe by the ſeſſions; but he thought, if they had determined it on the latter ground, they had done very right. Mr. Juſtice *Aſton* was of the ſame opinion, and obſerved how hard it might be to bind an apprentice on a perſon occupying lands in one pariſh, and being a houſekeeper in a very diſtant pariſh. Mr. Juſtice *Willes* aſſented. And the rule for quaſhing the order of ſeſſions was diſcharged, and the ſeſſions order confirmed. *Bott.* 389. *Loffi.* 79.

E. 13 *Ann. Q.* and *Wagſtaff.* It was moved to quaſh an order to compel a perſon to take an apprentice, becauſe in the cloſe of the indenture it was ſaid, that the maſter, at the end of the term, ſhall

give

give his apprentice two ſuits of cloaths. Upon debate, the court held this to be ill; for the juſtices during the term of his apprenticeſhip cannot order him wages, they muſt only order him a maintenance as an apprentice, and cannot order him any thing after the term is ended. So the order was quaſhed. *Foley* 205. 1. *Seſſ. C.* 48.

Binding in incorporated diſtricts.

5. In hundreds or other diſtricts incorporated by particular acts of parliament for relief of the poor, where, by ſuch acts, power is given to bind poor children apprentices; the reſpective perſons, to whom they ſhall be appointed to be bound, ſhall receive and provide for them according to the indentures to be executed by the directors and acting guardians, and ſhall execute the counterpart of ſuch indentures: And if any perſon ſhall refuſe to receive ſuch apprentice, or to execute ſuch counterpart of the indenture; he ſhall, on conviction on the oath of one of the ſaid directors, or acting guardians, or other credible witneſs, before two juſtices, forfeit 10l. to the poor within ſuch incorporated diſtrict, to be levied by diſtreſs. Saving always to ſuch perſon his appeal to the next ſeſſions, whoſe order therein ſhall be final.—And provided, that nothing herein ſhall extend to compel any perſon to take any ſuch poor child apprentice, unleſs he be an inhabitant and occupier of lands, in the pariſh to which ſuch child belongs. 20 *G.* 3. *c.* 36.

* *V. Money given to bind out poor apprentices.* * 69.

By the 7 *J.* *c.* 3. All money given by any perſon to be continually employed for the binding out apprentices, ſhall be employed in manner following, unleſs otherwiſe ordered by the givers; *viz.* All corporations of cities, boroughs, and towns corporate, and in places not corporate, the miniſter, conſtables, churchwardens, overſeers, or the moſt part of them, ſhall have the nomination and placing of ſuch apprentices, and ordering of ſuch money; and if they ſhall not employ the ſame accordingly, every perſon offending ſhall forfeit 3l. 6s. 8d. half to the poor, and half to him that ſhall ſue. *ſ.* 2.

And the maſter that ſhall receive the money, ſhall be bound with one or two ſureties in double the ſum, unto ſuch corporation, or to the other perſons appointed by this act in places not corporate, to take care of it, on condition to repay it at the end of ſeven years, or within three months thereof; and if the apprentice ſhall happen to die within the ſeven years, then within one year after ſuch death, and if the maſter ſhall die, then within one year after ſuch maſter's death. *ſ.* 3.

And the ſaid money ſhall always be put forth in three months after it ſhall come to the ſaid parties hands; and if there are not then fit perſons to be bound apprentices, within the places where the money is given to be employed, it ſhall be diſpoſed of for binding ſome of the pooreſt children of any adjoining pariſh. *ſ.* 4.

And choice ſhall always be made of the pooreſt children; and no ſuch apprentice ſhall be above 15 years of age when bound. *ſ.* 5.

And

And the ſaid perſons, in places not corporate, ſhall yearly within a month after *Eaſter*, account to their ſucceſſors before two juſtices dwelling in or next to the place. *ſ.* 6.

And if any of the truſtees ſhall break their truſt, or commit any offence for which no penalty is given by this act; any perſon may petition the lord chancellor, who may iſſue a commiſſion to hear and determine the ſame, and may levy the money miſemployed upon ſuch defaulters, or otherwiſe upon ſuch able inhabitants of the place, as they ſhall think fitteſt; and perſons aggrieved may appeal to the lord chancellor. *ſ.* 7.

* 70. * *VI. Binding poor apprentices to the ſea-ſervice.*

Who may be bound. 1. It ſhall be lawful for two juſtices, and for the head officers in corporations, and for the churchwardens and overſeers of the ſeveral pariſhes or townſhips, with the conſent of ſuch juſtices or head officers, to bind and put out any boy at the age of ten years or upwards, or who ſhall be chargeable, or whoſe parents ſhall be chargeable, or who ſhall beg for alms, to be an apprentice to the ſea-ſervice, to any ſubject being maſter or owner of any ſhip or veſſel, until he ſhall attain the age of 21 years. 2 & 3 *Ann. c.* 6. *ſ.* 1.

And every perſon to whom any poor pariſh boy ſhall be put apprentice by the 43 *El.* may, with the conſent of two juſtices dwelling near the pariſh where ſuch poor boy was bound, or with the like conſent of the chief officer in a corporation, at the requeſt of the maſter, his executors, adminiſtrators or aſſigns, by indenture aſſign over ſuch poor boy apprentice, to any maſter or owner of a ſhip or veſſel, uſing the ſea-ſervice, during the remaining time of his apprenticeſhip. *ſ.* 6.

Who ſhall take. 2. And every maſter or owner of a ſhip, from 30 to 50 ton burden, ſhall be obliged to take one ſuch apprentice, and one more for the next 50 ton, and one more for every hundred ton ſuch ſhip ſhall exceed the burden of an hundred ton; on pain of forfeiting 10l. to the poor of the pariſh from whence ſuch boy was bound. *ſ.* 8.

But no maſter ſhall be obliged to take any ſuch apprentice, under 13 years of age, or who ſhall not appear to be fitly qualified both as to health and ſtrength of body for that ſervice. 4 *An. c.* 19. *ſ.* 16.

Age to be inſerted in the indenture. 3. The boy's age ſhall be inſerted in the indenture, being truly taken from a copy of the entry in the regiſter-book (where it can be had), which copy ſhall be given and atteſted by the miniſter without fee: And where no ſuch entry can be found, two ſuch juſtices, and ſuch head officers, ſhall as fully as they can inform themſelves of ſuch boy's age, and from ſuch information ſhall inſert the ſame in the indentures. 2 & 3 *An. c.* 6. *ſ.* 1.

What money ſhall be given with him. 4. And the churchwardens and overſeers ſhall pay down to the maſter, at the time of the binding, the ſum of 50s. for cloathing and bedding; and the charges by this act appointed ſhall be allowed on their accounts. 2 & 3 *An. c.* 6. *ſ.* 2.

5. The

5. The churchwardens and overſeers ſhall ſend the indentures to the collectors of the cuſtoms at the port * whereunto the maſter belongeth; who ſhall enter the indenture in a book, and make an indorſement upon the indenture of the regiſtry thereof, ſubſcribed by him, without fee. And if he ſhall neglect or refuſe to enter ſuch indentures, and indorſe the ſame, or make falſe entries, he ſhall forfeit 5l. to the poor of the pariſh from whence ſuch boy was bound. 2 & 3 *An.* *c.* 6. *ſ.* 5. *Indentures to be regiſtered.* * 71.

6. Such apprentice ſhall be conveyed to the port to which his maſter belongeth, by the churchwardens, and overſeers, or their agents; and the charges thereof ſhall be paid as by the vagrant act of 11 & 12 *W.* 2 & 3 *An.* *c.* 6. *ſ.* 10. *Apprentice how conveyed to the port.*

That is to ſay out of the gaol and marſhalſea money; which by the 12 *G.* 2. *c.* 29. is directed to be paid out of the general county rate.

7. The counter part of the indenture ſhall be ſealed and executed by the maſter, and atteſted by the collector of the port, and the conſtable or other officer who carries the apprentice; which officer ſhall tranſmit ſuch counterpart to the churchwardens and overſeers of the place from whence the apprentice was bound. 2 & 3 *An.* *c.* 6. *ſ.* 11. *Counterpart to be then executed.*

8. And the collector or his deputy ſhall tranſmit a certificate under his hand, to the commiſſioners of the admiralty, containing the name and age of ſuch apprentice, and to what ſhip he belongs; and on receipt of ſuch certificate, a protection ſhall be made and given *gratis* to ſuch apprentice till he attain the age of 18 years. 2 & 3 *An.* *c.* 6. *ſ.* 5. *Protection from being impreſſed.*

Alſo every perſon who ſhall voluntarily bind himſelf apprentice to the ſea-ſervice, ſhall not be impreſſed for three years from the date of his indentures; which indentures ſhall be regiſtred, and certificates thereof given and tranſmitted by the collector as aforeſaid; on receipt of which certificates protections ſhall be made and given for the firſt three years, without fee. *id.* *ſ.* 15.

But by 4 *An.* *c.* 19. No perſon of the age of 18 years ſhall have any protection from being impreſſed, who ſhall have been in any ſea-ſervice, before he bound himſelf apprentice. *ſ.* 17.

But every perſon not having before uſed the ſea, who ſhall bind himſelf apprentice to ſerve at ſea, ſhall be exempted from being impreſſed for three years: and the commiſſioners of the admiralty, on due proof of the circumſtances, ſhall grant a protection accordingly, without fee. 12 *G.* 2. *c.* 17.

9. When ſuch pariſh or voluntary apprentice ſhall be impreſſed, or voluntarily enter into the king's ſervice, the * owner or maſter, his executors, adminiſtrators or aſſigns, ſhall be intitled to able ſeamens wages, for ſuch of the apprentices, as ſhall upon due examination be found qualified for the ſame, notwithſtanding their indentures of apprenticeſhip. 2 & 3 *An.* *c.* 6. *ſ.* 17. *When impreſſed the maſter to have the wages.* * 72.

10. Such poor boys bound out, or aſſigned over, to the ſea-ſervice, until they ſhall attain to the age of 18 years, ſhall be exempted from the payment of 6d. a month to Greenwich hoſpital. 2 & 3 *An.* *c.* 6. *ſ.* 17. *Exempted from the* 6*d.* *a month.*

Maſter to enter his apprentices on clearing out.

11. Every maſter ſo obliged to take ſuch apprentice, ſhall after his arrival into any port aforeſaid and before he clears out of ſuch port, give an account in writing under his hand, to the collector, containing the names and number of ſuch apprentices as are there remaining in his ſervice. 2 & 3 *An. c.* 6. *ſ.* 9.

The ſame to be inſerted in the coquet.

12. And every cuſtom-houſe officer ſhall inſert at the bottom of their coquets, the number of men and boys on board their reſpective ſhips at their going out, deſcribing the apprentices by their names, ages, and dates of their indentures, for which no fee ſhall be taken. 2 & 3 *An. c.* 6. *ſ.* 14.

Regiſtry to be kept in the ports.

13. And the collector in the port ſhall keep a regiſter, containing the number and burden of all ſhips belonging to the port, together with the maſters or owners names, and alſo the names of all ſuch apprentices in ſuch ſhips, and from what pariſhes and places they were ſent; and ſhall tranſmit (gratis) true copies thereof ſigned by him, to the quarter ſeſſions, or to ſuch towns corporate, pariſhes, or places, when and ſo often as he ſhall be reaſonably required ſo to do; and every collector refuſing or neglecting to ſend ſuch copy, ſhall forfeit 5l. to the poor of the pariſh from whence ſuch boy was bound. 2 & 3 *An. c.* 6. *ſ.* 13.

Differences between ſuch maſters and apprentices.

14. Two juſtices near the port, and mayors of towns corporate, in or near adjoining to ſuch port to which ſuch ſhip or veſſel ſhall at any time arrive, may determine all complaints of ill uſage from the maſter to ſuch apprentice, and alſo of all ſuch as ſhall voluntarily put themſelves apprentices to the ſea ſervice, and make ſuch order therein as they are now enabled by law to do, in other caſes between maſters and apprentices. 2 & 3 *An. c.* 6. *ſ.* 12.

Penalties.

15. All the penalties aforeſaid ſhall, by warrant of two juſtices of the county, city, or town corporate, be levied by diſtreſs and ſale. 2 & 3 *An. c.* 6. *ſ.* 18.

Maſter dying.

16. If any maſter who hath been obliged to take ſuch pariſh boy an apprentice, ſhall die, during the term; his widow, or his executor or adminiſtrator,

* 73. may aſſign over * ſuch apprentice to any other maſter who hath not his complement of apprentices. 4 *An. c.* 19. *ſ.* 16.

Note, By the 2 *G.* 3. *c.* 15. Maſters, apprentices, mariners, and others employed in fiſhing veſſels upon the coaſts, are exempted, during ſuch their employment, from being impreſſed. *ſ.* 22, 23, 24, 25.

VII. Differences between the maſter and apprentice.

Maſter may chaſtiſe his apprentice.

1. A maſter may by law correct and chaſtiſe his apprentice, for neglect or other miſbehaviour, ſo it be done with moderation: though it doth not ſeem to be lawful for the maſter or miſtreſs to beat any other ſervant of full age. *Lamb.* 127. 1 *Black.* 428.

2. The

2. The maſter may not of his own accord diſcharge his apprentice, but if they cannot agree, they may proceed in one of theſe two ways; either upon the ſtatute of the 5 *El.* c. 4. or upon the ſtatute of 20 *G.* 2. *c.* 19.

Whether the maſter himſelf can diſcharge his apprentice.

3. By the 5 El. c. 4. *If any ſuch maſter ſhall miſuſe or evil intreat his apprentice, or the ſaid apprentice ſhall have any juſt cauſe to complain, or the apprentice do not his duty to his maſter, then the ſaid maſter or apprentice being grieved, and having cauſe to complain, ſhall repair unto one juſtice* (C D) *of the county, or to the mayor or other head officer of the city, town corporate, or market town, or other place where the maſter dwelleth; who ſhall by his wiſdom and diſcretion take ſuch order and direction between the maſter and his apprentice as the equity of the cauſe ſhall require: and if for want of good conformity in the maſter, the ſaid juſtice (or head officer) cannot compound and agree the matter, he ſhall take bond of the ſaid maſter to appear at the next ſeſſions; and on his appearance, and hearing of the matter there, if it be thought meet to diſcharge the ſaid apprentice, then the juſtices, or four of them at the leaſt* (1 Q.) *or the ſaid mayor or other head officer, with the conſent of three other of his brethren, or men of beſt reputation in ſuch city, town corporate, or market town, ſhall have power, in writing* (E) *under their hands and ſeals, to pronounce and declare, that they have diſcharged the ſaid apprentice from his apprenticehood, and the cauſe thereof: And the ſaid writing being inrolled by the clerk of the peace, or town-clerk, among ſt the records, ſhall be a ſufficient diſcharge for the apprentice againſt his maſter, his executors and adminiſtrators. And if the default ſhall be found to be in the apprentice, then the ſaid juſtice, or the ſaid mayor, or other head officer, with the aſſiſtance aforeſaid, ſhall cauſe ſuch due correction and puniſhment to be adminiſtred unto him, as by their wiſdom and diſcretions ſhall be thought meet. ſ.* 35.

Difference between the maſter and apprentice by 5 El. c. 4.

* *If any ſuch maſter*] That is, any ſuch maſter as is before mentioned in this ſtatute, and in the trades therein ſpecified; and the former reſolutions confined the ſenſe of the ſtatute to ſuch trades only, but the latter adjudications ſeem to extend the equity thereof to other trades not mentioned in the ſtatute; as in the following inſtances: * 74.

M. 7 *W.* *K.* and *Gately.* On a certiorari it was moved to quaſh an order of ſeſſions, for the diſcharge of one *Edward Green* from his apprenticeſhip to the defendant *Gately.* The fact was, that *Gately* was a mountebank, and being at a place in *Yorkſhire*, where he kept a publick ſtage, *Green* was by indenture bound apprentice to him in this manner, *viz.* to *Robert Gately*, ſurgeon, to learn the trade he now uſeth; and immediately he went upon the ſtage, and ever ſince continued in the employ. After which, being with his maſter *Gately* in *Middleſex*, he complained to the juſtices, that his maſter did not teach him the trade. Upon which they diſcharged him. This being done, *Green* ſet up the trade of mountebank himſelf. It was moved to quaſh the order, the juſtices being willing, becauſe they were impoſed upon. And the exception was, that the ſtatute of the 5 *El.* in diſcharging apprentices is confined, and extends only to apprentices mentioned in that

clauſe, and there neither ſurgeon nor mountebank is mentioned: And tho' a ſurgeon may be a trade within the ſtatute, which a man cannot exerciſe without ſerving an apprenticeſhip to, becauſe that clauſe of the ſtatute is general; yet this part of the ſtatute, relating to the diſcharge of apprentices, extends only to trades there mentioned. By the court; The clauſe relating to the diſcharge of apprentices is general, and goes to all manner of apprentices, even to thoſe of merchants; but afterwards the court were of opinion, that the power of diſcharging reaches only to the trades mentioned in the ſtatute, among which a ſurgeon is not mentioned; for that, tho' as to the ſerving ſeven years apprenticeſhip, a ſurgeon comes under the general term of arts and miſteries, yet the power of diſcharging reaches only to the trades particularly mentioned. 2 *Salk.* 471, 2.

And *M.* 12 *An. Q.* and *Furneſe.* It was held, that the ſtatute extends only to the trades therein mentioned; and therefore not to a glaſs bottle maker. *Caſ. of S.* 29.

On the other hand in the caſe of *K.* and *Collingbourn*, *M.* 12 *G.* Exception was taken to an order of diſcharge, that the juſtices could not diſcharge the apprentice, becauſe the trade to which he was bound, *viz.* a glazier, was not within the ſtatute: But not allowed; * 75. for though * formerly it was held, that the trade ought to be a trade within the ſtatute, yet the latter reſolutions have been otherwiſe. L. *Raym.* 1410. *Str.* 663.

Shall miſuſe or evil intreat his apprentice.] An apprentice to a ſurgeon was ſent by his maſter to the *Eaſt Indies*: It was adjudged, that the maſter cannot compel his apprentice to go beyond the ſea, except the maſter go with him; but he may ſend him to any part of *England.* 13 *Ja. Coventry* and *Windall.* Brownl. 67.

But otherwiſe, if it be expreſsly agreed, or the nature of the apprenticeſhip doth import it; as if the maſter be a merchant adventurer, or ſailor. *Hobart.* 134.

Evil intreat.] *E.* 8. *G.* 2. *K.* and *Eaſman.* An apprentice was diſcharged, the maſter having *uſed him unkindly*, and refuſing to provide for and entertain him: But by the court, this is not a good ground for the diſcharge: for there is a power to oblige the maſter to receive and entertain the apprentice, and *uſing him unkindly* is too looſe. *Str.* 1014.

Or the apprentice do not his duty to his maſter.] *T.* 4 *G. K.* and inhabitants of *Hales Owen.* An order reciting that *Joſeph Higgin* was bound out by indenture, as the ſtatute requires, to *John Parks*, and being lame, and having the king's evil, and in the opinion of ſurgeons incurable, therefore the juſtices diſcharge the maſter from his apprentice. It was moved to confirm the order, becauſe the maſter cannot then have the end of the binding, which was, the ſervice of his apprentice. But it was anſwered, that the ſtatute only impowers the juſtices to diſcharge for miſbehaviour, and not for ſickneſs. And quaſhed by the court; for the maſter takes the apprentice for better and worſe, and is to provide for him in ſickneſs and in health. *Str.* 99.

Shall repair unto one juſtice.] Upon an order made at the ſeſſions to diſcharge an apprentice, it did not appear, that he applied himſelf

to a juſtice firſt. And *Holt* Ch. J. was of opinion, that the juſtice hath power to make an order, and if obeyed by the maſter, then the ſeſſions can have no power; if diſobeyed, then the juſtice upon complaint may bind the maſter to the ſeſſions, and that the ſeſſions have no power otherwiſe. 1 *Salk.* 67.

T. 13 *W. K.* and *Johnſon.* Exception was taken to an order for diſcharging an apprentice, that the complaint was made originally at ſeſſions, without any previous application to a ſingle juſtice out of ſeſſions: *Holt.* Ch. J. delivered the opinion of the court, That the order was good; if it had been a new queſtion, he ſhould have held a prior application to ſome juſtice out of ſeſſions neceſſary; but * after ſo many orders affirmed in this court, which have been otherwiſe, it is too late to unſettle that now. 1 *Salk.* 68. * 76.

So alſo in the caſe of *K.* and *Gill*, *H.* 5 *G.* It was ſaid by the court,—It hath been ſo often reſolved, that the ſeſſions hath an original juriſdiction, that we will not ſuffer it now to be made a queſtion, though it might be doubtful upon the ſtatute itſelf. *Str.* 143.

And, *T.* 12. *G. K.* and *Davie.* The court agreed, that it is a point not now to be diſputed, that the ſeſſions hath an original juriſdiction to diſcharge apprentices. *Str.* 704. And by lord Hardwicke Ch. J. in the caſe of *K.* & *Eaſman*, *E.* 8. *G.* 2. This determination is right; for the application which the act directs to be made to a private juſtice, ſeems to mean only to arbitrate and accommodate the diſpute. The ſtatute ſays, if he cannot *compound* the matter, he is to take bond for the parties appearance at the ſeſſions, ſo that they are not to take it by appeal. *Caſes in the time of lord Hardwicke.* 101.

Or to the mayor or other head officer.] *M.* 12 *G. K.* and *Collingburne.* An order of ſeſſions was made at *Hick's Hall*, for the diſcharge of an apprentice to a freeman of the city of *London*, and who was bound and inrolled there. And the order being removed into the king's bench, the queſtion was, whether the court of ſeſſions at *Hick's Hall* hath any juriſdiction to diſcharge an apprentice to a freeman of *London* (eſpecially as there is a ſaving in the act, of the cuſtom of the city of *London*); or whether he ought not to be diſcharged by the mayor's court only. It appeared that the apprentice lived with his maſter out of the city of *London*, and within the juriſdiction of the juſtices of *Middleſex*. To this exception it was anſwered, that the ſtatute doth not regard where the binding or inrolling is, but gives the juriſdiction expreſly to the juſtices where the maſter lives; and if this did not belong to the juſtices of *Middleſex*, where the maſter lives, there would be a failure of juſtice: for neither the chamberlain, nor any other city magiſtrate, have power to compel the maſter's appearance before them. The court affirmed the order of diſcharge, and ſaid they would not take away the juriſdiction of the mayor's court, but only give a concurrent juriſdiction to the juſtices for the county. And it would be very inconvenient, to have apprentices to a freeman of *London*, who are bound there, and who live in diſtant counties, obliged to come up to the mayor's court to get themſelves diſcharged: And the words of the ſtatute are very plain; for they give the juriſdiction to the juſtices *where the maſter dwelleth.* Str. 663.

* 77. * *Who ſhall by his wiſdom and diſcretion take ſuch order and direction between the maſter and his apprentice as the equity of the caſe ſhall require.*] Hereupon the juſtice, if he ſees cauſe, may, by conſent of the maſter, diſcharge the apprentice from his apprenticeſhip: but this muſt not be by a verbal diſcharge; for the apprentice being by deed, cannot be diſcharged but by deed, that is, by order under the hand and ſeal of the juſtice. *Dalt. c.* 58. 6 *Mod.* 182.

If for want of good conformity in the maſter.] If the maſter is diſſatisfied, he may have the matter transferred to the ſeſſions: but here is not the like option given to the apprentice; and the reaſon ſeems to be, becauſe the apprentice being moſt commonly an infant, the law preſumes that the juſtice is more capable of judging what is for the infant's benefit.

On his appearance.] *E.* 13 *W. Ditton*'s caſe. It was moved to quaſh an order made for the diſcharge of an apprentice. The queſtion aroſe upon the clauſe of the ſtatute which directs, that upon appearance of the maſter, the apprentice may be diſcharged by four juſtices, after one juſtice out of ſeſſions hath endeavoured to compoſe the matter in difference. And in this caſe it was objected, that *Ditton* the maſter was bound over to appear, and did not; and the juſtices have but a limited juriſdiction, and it is expreſly directed by the act, that the diſcharge is to be made on the appearance of the maſter; beſides, there is another remedy, to proceed on the recognizance which is forfeited by not appearing. By the court: The act muſt have a reaſonable conſtruction, ſo as not to permit the maſter to take advantage of his own obſtinacy; and it would be very hard, that ſuppoſing the maſter is profligate, and runs away, the apprentice ſhall never be diſcharged. 2 *Salk.* 490.

H. 5 *G. K.* and *Gill.* An order of ſeſſions for diſcharging an apprentice was quaſhed, becauſe it did not ſet forth, that the maſter was ſummoned, or did appear. *Str.* 143.

So alſo, *E.* 8 *G.* 2. *K.* and *Eaſman.* The order was quaſhed, becauſe it did not appear that the maſter was preſent or ſummoned, which it is plain the act intended he ſhould be. *Str.* 1013.

Inrolled by the clerk of the peace.] *T.* 4 *G. K.* and inhabitants of *Hales Owen.* The order of diſcharge was not inrolled; and by the court for that reaſon held ill. *Str.* 99.

Shall be a ſufficient diſcharge for the apprentice againſt his maſter.] But as the juſtices may diſcharge the apprentice from his maſter, for ill uſage; ſo alſo they may * diſcharge the maſter from the apprentice * 78. for evil and diſorderly behaviour. *Read.* Appr.

Diſcharge.] *T.* 13 *W. K.* and *Johnſon.* Exception was taken to an order of diſcharge, that the juſtices had ordered money to be returned: But by the court, the order is good. And *Holt* Ch. J. ſaid he never doubted of that matter, for it is a power conſequential upon their juriſdiction to diſcharge. 1 *Salk.* 68.

But in the caſe of *K.* and *Vandeleer*, *M.* 4 *G.* The juſtices at the ſeſſions did order an apprentice to be diſcharged, and that the maſter having received 5*l.* with him, ſhould refund 3*l.* as a further proviſion for him. This was moved to be quaſhed, becauſe the ſtatute which gives the juſtices power to diſcharge, gives them no authority to order

any

any money to be returned. By the court: it is very hard, that if the maſter miſuſeth his apprentice, the next day after he is bound, he ſhould pay back nothing if he is diſcharged: It will be an encouragement to maſters to treat their apprentices ill; but the ſtatute being ſilent, the order muſt be quaſhed. *Str.* 69.

Nevertheleſs, this doctrine of refunding ſeemeth now to be eſtabliſhed, as founded on great reaſon, tho' not expreſly mentioned in the act; for the juſtices being authorized to diſcharge *according to their diſcretions*; when the end of the apprenticeſhip cannot be attained with one perſon, it is but juſtice the maſter ſhould return part of the money he has received with his apprentice, to place him out with a new maſter. 2 *Bac. Abr.* Maſter and ſervant.

And in the caſe of *K.* and *Amies*, *T.* 7 *G.* 2. it was held, that an order of the maſter to return money is good, tho' it is not averred that he had any with the apprentice: for the order being to return money is a neceſſary proof of the receipt of it; and the juſtices in their orders are not obliged to ſet forth all the ſteps they take in their proceedings, there being nothing in the act which makes it neceſſary; and there is a known and eſtabliſhed diſtinction between orders and convictions. *Id.*

In the chancery. Jan. 22, 1745. Ex parte *Sandby*. The petitioner, on the tenth of January 1744, was put apprentice to *Ward*, a bookſeller at *York*, and the ſum of 80l. was given with him as an apprentice for 7 years. In July following, a commiſſion of bankruptcy was taken out againſt *Ward*; and being declared a bankrupt, aſſignees were choſen, who ſell off the bankrupt's effects, and he is now the ſupervifor of the preſs to the purchaſer, and becomes incapable of performing his part of the contract, nor is the petitioner able to raiſe any money to put *him out an apprentice to another maſter, and the commiſſion being a recent one, probably no dividend may be made in a year, or a year and a half; ſo that all this time will be loſt to the petitioner. Upon theſe circumſtances, the petitioner prayed, that on deducting 10l. out of the 80l. for his board with the bankrupt during the ſix months he lived with him, the aſſignees ſhould be ordered to pay him the ſum of 70l. out of the effects of the bankrupt already come to their hands, and not oblige him to prove it as a debt under the commiſſion. The lord chancellor *Hardwicke* was at firſt doubtful, and ſeemed inclined to grant the petition, but on ordering ſearch to be made for precedents, and ſeveral being produced wherein it was directed that apprentices ſhould come in as creditors only, after deducting for the time they lived with the bankrupt, upon the remaining ſum; it was ordered accordingly in this caſe, and that the petitioner ſhould be admitted a creditor for 70l. only. 1 *Atkyns.* 149. * 79.

Shall cauſe due correction and puniſhment to be adminiſtred.] This being left indefinite, it ſeemeth moſt appoſite, that the juſtice commit the apprentice to the houſe of correction for a time, to be kept to hard labour, or otherwiſe corrected as the nature of the offence may require.

4. By

Differences between the master and apprentice by 20 Geo. 2. c. 19.

4. By the 20 *G.* 2. *c.* 19. *On complaint* (F) *unto two juſtices, by any pariſh apprentice or other apprentice upon whoſe binding out no larger a ſum than* 5l. *was paid, concerning any miſuſage, refuſal of neceſſary proviſion, cruelty, or other ill treatment, they may ſummon* (G) *the maſter or miſtreſs to appear before them at a reaſonable time to be named in ſuch ſummons; and on proof upon oath of the truth of the ſaid complaint (whether the maſter or miſtreſs be preſent or not, if ſervice of the ſummons be alſo upon oath proved) the ſaid juſtices may diſcharge* (H) *the apprentice by warrant or certificate under their hands and ſeals, for which warrant or certificate no fee ſhall be paid.* ſ. 3.

And ſuch juſtices on complaint (J K) *on oath by any maſter or miſtreſs, againſt any ſuch apprentice, concerning any miſdemeanor, miſcarriage, or ill behaviour, may hear and determine the ſame, and puniſh the offender, by commitment* (L) *to the houſe of correction, there to remain and be corrected, and held to hard labour for a reaſonable time, not exceeding one kalendar month, or otherwiſe by diſcharging* (M) *ſuch apprentice.* ſ. 4.

Perſons aggrieved by any determination, order or warrant of ſuch juſtices (except any order of commitment) may appeal to the next ſeſ-
* 80. ſions, who may award coſts to * either party not exceeding 40s. to be levied by diſtreſs and ſale. *ſ.* 5.

And no certiorari ſhall iſſue to remove any the ſaid proceedings. *ſ.* 6.

Apprentice fleeing into another ſhire.

5. If any apprentice of huſbandry, or of any art or occupation aforeſaid, ſhall flee into any other ſhire, the juſtices, mayors, or other head officers being juſtices, may iſſue writs of capias to the ſheriffs of the counties or other head officers of the places whither he ſhall ſo flee, to take his body, returnable before them at what time ſhall pleaſe them; ſo that if he come by ſuch proceſs he may be put in priſon, till he find ſufficient ſurety well and honeſtly to ſerve his maſter. 5 *El. c.* 4. *ſ.* 47.

And by the 24 *G.* 2. *c.* 55. If a juſtice ſhall iſſue a warrant againſt ſuch perſon, and he ſhall eſcape into another ſhire; the conſtable or other perſon, on having the warrant indorſed by a juſtice in ſuch other ſhire, may arreſt him there, and carry him before a juſtice in ſuch other ſhire, if the offence is bailable, to find bail, or elſe ſhall carry him back before a juſtice in the ſhire from whence the warrant did firſt iſſue.

Apprentice leaving his maſter's ſervice, the maſter is entitled to his earnings.

6. Feb. 3. 1747. *Hill* and *Allen.* In chancery. The bill was by an apprentice, who againſt his maſter's conſent quitted his ſervice of a ſhipwright, before his time was out, and went on board a privateer, which took a very conſiderable prize, whoſe ſhare thereof, being 1200l. the maſter claimed. By lord Hardwicke: In general, the maſter is entitled to all that the apprentice ſhall earn; conſequently, if he runs away, and goes to a different buſineſs, the maſter is intitled at law to all his earnings. And in this caſe, his lordſhip ſaid, there

was

was nothing in equity to relieve. But he said he would send the case to be tried at law, unless they would agree to compound the matter, which he recommended to them, and thought, as the boy's share of the prize was so very large, the balance ought to be in his favour. And the master agreed to accept 450l. 1 *Vezey*, 83.

7. By the 6 *G.* 3. *c.* 25. If any apprentice shall absent himself from his master's service, before the term of his apprenticeship shall be expired; he shall, at any time thereafter, whenever he shall be found (so it be within 7 years after the expiration of his term), be compelled to serve his said master, for so long time as he shall have absented himself; unless he shall make satisfaction to his master for the loss he shall have sustained by such absence: And if he shall refuse so to serve, or to make satisfaction, the master may complain upon oath to one justice where he shall reside; who * shall issue his warrant for apprehending * 81. such apprentice. And such justice, on hearing the complaint, may determine what satisfaction shall be made to such master by the apprentice. And if the said apprentice shall not give security to make satisfaction according to such determination; such justice may commit him to the house of correction for any time not exceeding three months.

Apprentice to serve beyond his term, for the time that he absented.

Persons aggrieved by such determination, order, or warrant of the justice (except any order of commitment), may appeal to the next sessions, giving 6 day's notice to the justice and to the parties, and entring into recognizance, within 3 days after such notice, before a justice, with sufficient surety to try the appeal at, and to abide the order or judgment of, and pay such costs as shall be awarded by the justices at such sessions: Which said justices, at their said sessions, on proof of such notice given, and of entring into such recognizance, shall hear and determine the appeal, and give such relief and costs to either party, as they shall judge reasonable. And their determination shall be final and conclusive to all parties concerned.

Provided, that nothing herein shall extend to the stanneries in Devon or Cornwall; or to impeach or lessen the jurisdiction of the chamberlain of London, or of any other court within the said city, touching apprentices; nor to any apprentice, whose master shall have received with him the sum of 10l.

VIII. Apprentice stealing his master's goods.

By the 21 *H.* 8. *c.* 7. Servants going away with their master's goods, with intent to steal them, shall be guilty of felony; but not to extend to apprentices.

And by 12 *An. st.* 1. *c.* 7. Persons stealing to the value of 40s. being in a dwelling house or outhouse thereto belonging, tho' such house be not broken, and tho' no person be therein, are excluded from the benefit of clergy. But this not to extend to apprentices under fifteen years of age.

But if they be fifteen years of age, they shall be guilty as other persons.

IX. Inticing away an Apprentice.

The inticing of an apprentice to depart from his maſter, is not an offence of a public nature, for which an indictment will lie; but the
* 82. party's remedy is by an action on * the caſe, which he may well maintain. 6 *Mod.* 182. *Burrow, Manſfield*, 1306.

X. Aſſigning Apprentices (N).

The maſter aſſigning, and the apprentice himſelf conſenting, will not make him an apprentice to the aſſignee within the fifth of *El.* But by the cuſtom of *London*, he may be turned over to another. *Dalt. c.* 58.

And an aſſignment to the ſea ſervice is good by act of parliament, as is before mentioned.

E. 3 *G. K.* and *Barnes.* Order returned on a certiorari: It is reſolved by the juſtices at the ſeſſions, where a perſon was bound an apprentice to *Barnes* by the pariſh officers, and *Barnes* had aſſigned him to another, that the aſſignment is void, and they direct *Barnes* to take his apprentice again. But by the court; The ſeſſions had no power to judge of the validity of a deed, or to hinder a man from aſſigning his apprentice. The covenant to provide for him is well performed, if the perſon to whom he is bound aſſigns him to another to provide for him. Wherefore the order was quaſhed. *Foley*, 155. *Str.* 48.

For the juriſdiction of the juſtices extends no farther, than to compel the maſter to take care of his apprentice; but in what manner he does it, whether in his own houſe or otherwiſe, is nothing to them. But if the aſſignee of the apprentice doth not provide for him, the firſt maſter may be compelled to do it, and he may take his remedy over. 1 *Seſſ. C.* 110.

XI. Maſter dying.

It hath been ſaid, that if the maſter dies, the apprentice goes to the executor or adminiſtrator to be maintained, if there are aſſets; but the executor or adminiſtrator may bind him to another maſter for the remaining part of his time.

And in *M.* 10 *W. K.* and *Peck. Eyre* J. held, that an apprenticeſhip is a perſonal truſt between the maſter and ſervant, and determines by the death of either of them; and by the death of either of them, the end and deſign of the apprenticeſhip cannot be obtained, and it may be the executor is of another trade; he admitted covenant would lie againſt the executor, but in that there is no inconvenience, becauſe the executor may make his defence by pleading no aſſets, or debts of
* 83. a higher nature. *Holt* C. J. * ſaid, that by the cuſtom of *London*, the executor ſhall put the apprentice to another maſter of the ſame trade; and that in other places, it would be very hard to conſtrue the death of the maſter to be a diſcharge of the covenants; he ſaid, it had been held,

held, that the covenant for inſtruction failed, but that he ſtill continues an apprentice with the executor, as to maintenance. 1 *Salk.* 66.

E. 20 *G.* 2. *Baxter* (widow and executrix) againſt *Burfield.* In debt on bond, conditioned for *Matthias Anderſon*'s performance of the covenants in an indenture of apprenticeſhip, whereby he was bound to the plaintiff's teſtator, who was a mariner; the defendant pleaded, that *Anderſon* ſerved faithfully to the death of the teſtator: plaintiff replied, that ſince the death of the teſtator, *Anderſon* had abſented from her ſervice: to which there was a demurrer. And after argument at bar, *Lee* Ch. J. delivered the reſolution of the court, *viz.* That they were all of opinion the defendant ſhould have judgment, and that the executrix could maintain no ſuch action. The binding was to the *man*, to learn his *art*, and ſerve *him*, without any mention of executors. And as the words are confined, ſo is the nature of the contract; for it is fiduciary, and the apprentice is bound from a perſonal knowledge of the integrity and ability of the maſter. *H.* 8 *An. Horne* and *Blake*; an award that an apprentice ſhould be aſſigned, was held void; unleſs there was a cuſtom, or the concurrence of the apprentice. And they held, it was not material, that according to *Cro. Eliz.* 553. the aſſets were liable on the maſter's covenant to maintain. Therefore judgment was given for the defendant. *Str.* 1266.

Note, the words in *Cro. Eliz.* 553. are theſe: A covenant lies againſt an executor in every caſe, altho' he be not named; unleſs it be ſuch a covenant as is to be performed by the perſon of the teſtator, which they cannot perform.

But in the caſe of *Eaſt Bridgeford* and *Orſton*, *T.* 13 *G.* 2. The maſter of a pariſh apprentice dying inteſtate, his widow, without any adminiſtration taken out, aſſigned the apprentice to *Edward George*, who, with the conſent of the apprentice, aſſigned him over, by verbal agreement, to *Thomas Baggaley* at *Eaſt Bridgeford*, for the remainder of his term of nine years: And he accordingly lived with the ſaid *Thomas Baggaley* at *Eaſt Bridgeford*, and ſerved out his time there, which far exceeded forty days. This was unanimouſly holden to be a good ſettlement at *Eaſt Bridgeford*; ſince to this aſſignment, tho' only a verbal * one, there was the conſent of all the parties concerned; and he lived and inhabited at *Eaſt Bridgeford* under the terms of the apprenticeſhip, as an apprentice bound according to the ſtatute. *Burrow's Settlem. Caſ.* 133. * S4.

E. 26 *G.* 2. *Eakring* and *Selſon*. Two juſtices make an order to remove *George Witworth* from *Eakring* to *Selſon*. Upon appeal the ſeſſions diſcharge that order. The caſe was; the ſaid *George Witworth* was put out a pariſh apprentice to *Richard Tomlinſon* of *Eakring*, till his age of 20 years. He ſerved his maſter under this indenture for ſeveral years at *Eakring*. About three years before he attained 20 years of age, he ran away from his maſter, and loitered for ſome time about the country. In the mean time his maſter died. And at Martinmas after, the ſaid *Witworth* hired himſelf as a ſervant to *William Flint* of *Selſon* for a year, and ſerved him that year at *Selſon*, and received all his wages to his own uſe, the executors of *Tomlinſon* taking no notice of him. But he had not, at the expira-

tion of the ſaid ſervice, attained his age of 20 years. And the ſeſſions being of opinion that the ſaid *George Witworth* did not, by virtue of ſuch hiring and ſervice at *Selſon*, gain a ſettlement in the pariſh of *Selſon* aforeſaid, reverſe the original order. But by the court the order of ſeſſions was quaſhed; for that after the maſter's death, the apprentice was at liberty to hire himſelf, and as he was hired for a year, and ſerved a year in *Selſon*, his legal ſettlement was there. Apprenticeſhip is a perſonal truſt between the maſter and ſervant, and is determined by the death of either maſter or apprentice. The counſel who were to have ſhewn cauſe againſt quaſhing the order of ſeſſions, owned that it was not defenſible. *Burrow's Set. Caſ.* 320.

T. 14 *G.* 3. *Wrexham* and *Chirk*. An apprentice bound for three years, without any conſideration, to a ſlater at *Wrexham*, ſerved under the indenture for nine months. Then his maſter died; and he continued a fortnight with the widow, to complete the work unfiniſhed by his maſter. His miſtreſs then told him, having no further employment for him, that he muſt not ſtay with her, and he was at liberty to go where he thought proper. On his going away, he told his miſtreſs that he was going to his father, who was a ſlater. There was no particular agreement between his father and his miſtreſs, nor the indenture delivered up. His father then lived in the pariſh of *Chirk*, and he continued with him there two or three years. The court held that
* 83. his ſettlement remained at *Wrexham*. The widow does not appear to have had any intereſt; and no adminiſtration * appears to have been taken out. *Bur. Settl. Caſ.* 782.

In the court of chancery: *M.* 30 *C.* 2. In the caſe of *Soam* againſt *Bowden* and *Eyles*. The maſter received with the apprentice 25*l.* and died within two years, the apprentice having for that time been employed only in inferior affairs. It was decreed, after debts on ſpecialties paid, that the executors repay the 25*l.* as a debt due on ſimple contract: deducting after the rate of 20*l.* a year, for the maintenance of the apprentice, during the time he lived with his maſter. *Cha. Ca. Finch.* 396.

XII. Apprentices ſetting up their trades.

By the common law, no man may be prohibited to work in any lawful trade or in more trades than one, at his pleaſure. 11 *Co.* 53.

So that without an act of parliament no man may be reſtrained either to work in any lawful trade, or to uſe divers miſteries or trades; therefore an act of parliament made to reſtrain any perſon herein, muſt be taken ſtrictly, and not favourably as acts made in affirmance of the common law.

The reſtraining clauſe in the ſtatute of 5 *El. c.* 4 is as follows: *It ſhall not be lawful to any perſon, to ſet up, occupy, uſe or exerciſe, any craft, miſtery or occupation now uſed or occupied within the realm of England or Wales, except he ſhall have been brought up therein ſeven years at the leaſt as an apprentice by this ſtatute, nor to ſet any perſon on work therein, except he ſhall have been apprentice as aforeſaid, or elſe having ſerved as an apprentice will become a journeyman, or hired by the year, on pain of* 40*s. a month, half to the king, and half to the*

poor

that ſhall ſue in the ſeſſions, or other court of record; or if it is in a town corporate then to be diſpoſed of as other fines by the charter. ſ. 31.

It ſhall not be lawful] This is a negative clauſe, and no one ſhall exerciſe a trade againſt it, unleſs by virtue of a cuſtom as the widows of tradeſmen, who by cuſtom carry on the trade of their huſbands, which the court held not to be within this ſtatute. 2 *Salk.* 610.

To any perſon] But by the 15 *C.* 2. *c.* 15. Hemp workers of all kinds, net makers, and makers of tapeſtry hangings are excepted; who may ſet up without having ſerved ſeven years.

* And by 3 *G.* 3. *c.* 8. All officers, mariners, and ſoldiers, who have been employed in his majeſty's ſervice, and not deſerted, may exerciſe ſuch trades as they are apt for, in any town or place. * 86.

And by 6 & 7 *W.* *c.* 17. An apprentice diſcovering two offenders guilty of coining, ſo as they be convicted, ſhall be deemed a freeman, and may exerciſe his trade as if he had ſerved out his time. *ſ.* 12.

To ſet up, occupy, uſe, or exerciſe] *T.* 9 *G.* 3. *Beach* and *Turner.* On an action brought for exerciſing a trade, without having ſerved an apprenticeſhip, it appeared that the defendant was only a journeyman. And the queſtion was, whether the ſtatute extends to journeymen, or only to maſters? By the court: The ſtatute was meant to prevent *maſters* only from ſetting up trades, and did not intend to give a penalty againſt both. There is great difference between ſetting up a trade and working in it: A man may work in it, by doing a very trifling part. A journeyman doth not exerciſe the trade upon his own account, but for his maſter. *Burr. Manſf.* 2449.

And it is not material, as to the maſter, that the journeyman hath ſerved ſeven years; for if the maſter himſelf hath not ſerved ſeven years, he is reſtrained by the ſtatute to work as a trader either by himſelf or others; for the intent of the act is, to annex the benefit of trade to ſuch as underwent the hardſhip of learning it, thereby to encourage labour in youth: And few would undergo the trouble of being apprentices, if they might employ others to work for them. *T.* 3 *W.* *Hobbs* and *Young.* 2 *Salk.* 610.

If a man uſe the trade of a tallow chandler, baker, brewer, or any other lawful trade, or manual occupation, for his own uſe, or for the uſe of his family, without ſelling any for lucre and gain he may lawfully do it; but he cannot retain an apprentice therein; but he may hire one to be his ſervant, who is ſkilful in that trade or occupation. 8 *Co.* 129.

In like manner a perſon brought up to the trade may take a *partner*, who hath not ſerved an apprenticeſhip to the trade, provided the partner ſhare only in the profits or loſs of the buſineſs, and do not actually exerciſe the trade. As in the caſe of *Reynard* and *Chaſe*, *M.* 30. *G.* 2. An action of debt was brought againſt *Chaſe*, for a penalty on the act, for exerciſing the trade of a brewer, without having ſerved an apprenticeſhip. On a ſpecial verdict, it was ſtated, that the defendant *Chaſe* and one *Coxe* were partners in the trade; that the trade was carried on, and had been * for four years carried on, in their joint names; that *Coxe* did ſerve an apprenticeſhip to the trade, but *Chaſe* never did; and that *Coxe* is a working brewer, and was paid a ſalary for his labour, which ſalary was always deducted, and allowed to him, previous to a * 87.

diviſion of the profits; and the entries at the exciſe office were in their joint names: but that the defendant *John Chaſe* never exerciſed the trade himſelf (which was wholly managed and carried on by *Coxe*); but only ſhared the profits, and ſtood the riſques of the partnerſhip. The queſtion was, whether the defendant *John Chaſe* is within the act, upon this ſpecial finding?——By lord *Mansfield* Ch. J. The defendant is to ſhare the profits with *Coxe*, in moieties; and is liable to the debts of the partnerſhip: But it is expreſly found, that during all the time charged he never acted in or exerciſed the trade. He was not by the terms of his agreement, to act in the trade. The other partner was to do the whole, and had a particular ſalary on that account. It is not found, that either *Coxe*, or any ſervant under him, was ſet to work by *Chaſe*; nor that *Chaſe* did any act whatever of exerciſing the trade; he was only concerned in the profits. Now though this may be, to ſome purpoſes, exerciſing a trade, in reſpect of third perſons who deal with the partnerſhip as creditors, and within the meaning of the ſtatutes concerning bankrupts; yet the preſent queſtion is, whether it be exerciſing a trade contrary to this act. In the argument of this cauſe it hath been well obſerved, that this is a penal law; that it is in reſtraint of natural right; that it is contrary to the general right, given by the common law of this kingdom. To which I will add, that the policy on which the act was made, is, from experience, become doubtful. Bad and unſkilful workmen are rarely proſecuted. This act was made early in the reign of queen *Elizabeth*. Afterwards, when the great number of manufacturers, who took refuge in *England* from the duke of *Alva*'s perſecution, had brought trade and commerce with them, and inlarged our notions; the reſtraint introduced by this law was thought unfavourable, and the judges by a liberal interpretation, have extended the qualifications for exerciſing the trade much beyond the letter of it, and confined the penalty and prohibition to caſes preciſely within the expreſs letter. Let us conſider whether the preſent caſe be within the letter, or even the meaning of this act. The general policy of the act was, to have trades carried on, by perſons who had ſkill in them. Now here, the perſonal ſkill of the defendant makes no real difference in the caſe. For the perſon who is ſkilful acts every thing, * and receives no direction from this man: He neither did, nor was to interfere. The caſe of *Hobbs* and *Young* is not parallel. There, the defendant, a ſingle man, directed the whole trade; was the maſter; and directed all the ſervants. As between maſter and ſervant, no doubt, it is the maſter who carries on the trade, and not the ſervant. But in *Hobbs* and *Young* there was no partnerſhip; nor (what is the diſtinguiſhing character of the preſent caſe) a mere naked ſharing of the profits, and riſqueing a proportion of the loſs; without his acting or directing at all, in any manner whatſoever. In many conſiderable undertakings, it is abſolutely neceſſary to take in perſons as partners, to ſhare the profits and riſque the loſs. And the general uſage and practice of mankind ought to have weight, in determinations of this ſort, affecting trade and commerce, and the manner of carrying them on. It is notorious that many partnerſhips are entered into, upon the foundation of one partner contributing induſtry and ſkill; and the other, money. Many great breweries and other trades have been carried on, for the benefit of

* 88.

infants

infants and reſiduary legatees, under the direction of the court of chancery: Now if the plaintiff's conſtruction was to hold, the whole direction and decree of the court of chancery was contrary to law, and to an expreſs act of parliament. So it is likewiſe practiſed in other great trades. The late Mr. *Child* directed his buſineſs of a banker, to be carried on for the benefit of his children and other perſons. Many other inſtances might be mentioned. It would introduce the utmoſt confuſion in affairs of trade and commerce, if this conſtruction ſhould prevail. On the other hand, I ſee no inconvenience. It is exactly the ſame thing as to trade, in every particular, whether this partner has or has not ſerved an apprenticeſhip. Therefore I think the defendant not liable to the penalty of the ſtatute. The other three juſtices concurred. And judgment was given for the defendant. *Burrow. Mansfield.* 2.

Any craft, miſtery, or occupation] 1. 3 *G.* 3. *French* and *Adams.* An action of debt was brought upon the ſtatute againſt the defendant for exerciſing the trade of a *carpenter*, he not having ſerved an apprenticeſhip to that trade. It appeared that the defendant had worked or ſerved as a ſervant for ſeven years in the trade of a *glazier*, and for ſome time afterwards exerciſed that trade as a maſter; that afterwards he exerciſed the trade of a *carpenter* for the ſpace of nine years, and it was proved that he well underſtood that trade. It was objected, that the defendant being originally bred * up to the trade of a *glazier*, he could not follow two trades both *glazier* and *carpenter*; and whether he could or not, was the queſtion referred for the conſideration of the court:—By the court: All the judges of England at a meeting lately reſolved, that if any man as a maſter had exerciſed and followed any trade as a maſter without interruption or impediment for the term of ſeven years, he was not liable to be ſued or proſecuted on the ſtatute of 5 *El.* alſo if a man hath followed two or more different trades for the term of ſeven years or more, he ſhall not be liable to be proſecuted on this ſtatute. There is no law againſt one man's following ſeveral trades at this day. There was an ancient ſtatute, 37 *Ed.* 3. *c.* 6. that artificers or handicraftſmen ſhould uſe but one miſtery, and that none ſhould uſe any miſtery but that which he had before that time choſen and uſed. But this reſtraint of trade and traffick was immediately found prejudicial to the public, and therefore at the next parliament it was enacted that all people ſhould be as free as they were at any time before the ſaid ordinance. And lord Coke obſerves, that acts of parliament made againſt the freedom of trade never live long. Without the leaſt doubt, a man may follow twenty trades, if he has worked at or followed each trade ſeven years. Mr. Harriſon of Red Lion Square ſerved an apprenticeſhip to the trade of a *carpenter*, but for 26 years paſt he has been a *watchmaker*, and tho' he never ſerved as an apprentice to the trade of a watchmaker, is the beſt maker of time pieces in the world, and the parliament has given him a large ſum of money towards finding out the longitude by the help of his watches or time meaſurers: And ſhall this man be hindred from making watches, and exerciſing the trade of a carpenter alſo if he pleaſes? And by the whole court in the preſent caſe, judgment was given for the defendant. 2 *Wilſon.* 168.

* 89.

Now uſed] That is, on the 12th of *Jan.* 1562, when that parliament began; and this reſtraint ſhall not extend any further than the words

words do expreſly direct, and therefore not to new arts and miſteries ſince invented. 1 *Roll. Rep.* 10. 1 *Ventr.* 326, 346.

Within the realm of England *and* Wales] *M.* 1 *G.* 2. *K.* and *Liſter.* Indictment for uſing the trade of a dry ſalter, being a craft, miſtery, or occupation uſed in *this kingdom* on the 12th of *Jan.* in the 5th year of *Eliz.* Which the court held to be ill; for that the words in *this*
* 90. *kingdom* tie down the indictment to the kingdom of *Great* * *Britain*, as it is at this day; whereas it ſhould have been *in England* or *in England and Wales.* 2 Seſſ. C. 160. Str. 788.

H. 3 *G.* 2. *K.* and *Monro.* It was moved to quaſh an indictment for exerciſing the trade of a *baker*, the defendant not having ſerved a legal apprenticeſhip. The exception was, the trade was not ſaid to be uſed *within the realm of England and Wales* at the time of the act. But the court ſaid, the trade of a *baker* is within the words of the act; and no averment of the trade's being uſed at the time of the act is neceſſary, but where the trade only falls within the general concluſion of the clauſe at laſt. 1 *Barnardiſt.* 277.

Except he ſhall have been brought up therein ſeven years] *E.* 11 *W.* *K.* and *Fox.* Indictment for uſing the trade of a taylor, not having ſerved ſeven years, was quaſhed, becauſe it is ſaid only, not having ſerved as an apprentice within *England* or *Wales*; for it may be he did ſo beyond ſea, and if it were any where it ſufficeth. 1 *Salk.* 67.

As an apprentice] *E.* 5 *An.* *Q.* and *Maddox.* By the court; Upon indictment on this ſtatute, in evidence we allow following the trade for ſeven years to be ſufficient, without any binding, this being an hard law. 2 *Salk.* 613.

T. 3 *G.* 2. *K.* and *Morrice.* On an indictment for exerciſing a trade, without having ſerved a legal apprenticeſhip; the defendant offered to give evidence of his having exerciſed this trade for ſeven years, as being tantamount to his having ſerved an apprenticeſhip for that time. *Eyre* chief juſtice ſaid, that the caſes indeed had gone ſo far, as to allow a wife's living in the ſhop with her huſband for ſeven years to be equivalent to an apprenticeſhip; but he thought the preſent caſe not ſtrong enough to come up to the meaning of the ſtatute. Accordingly the evidence was diſallowed. 1 *Barnard.* 367.

But in the caſe of *Wallen* and *Holton*, at the aſſizes for *Berkſhire*, *T.* 33 *G.* 2. On an information againſt the defendant for exerciſing the trade of a baker contrary to the ſtatute, it appeared in evidence that he had followed it twelve years, but never had been an apprentice, nor ſerved with any perſon *as ſuch.* On a caſe reſerved, Baron *Adams*, before whom it was tried, conſulted the eleven judges; who all joined with him in opinion, that exerciſing a trade ſeven years, without any proſecution with effect, was a ſufficient qualification. *Blackſtone's Reports.* 233.

* 91. * *Nor to ſet any perſon on work therein, except he ſhall have been apprentice as aforeſaid.*] But by the 17 *G.* 3. *c.* 33. with reſpect to the counties of *Middleſex*, *Eſſex*, *Surry*, and *Kent*, for want of a ſufficient number of perſons who have ſerved apprenticeſhips to the trade of a *dyer*, it ſhall be lawful for any perſon exerciſing that trade within any of the ſaid counties, to employ ſuch number of journeymen,

ſervants,

ſervants, and labourers, as he ſhall have occaſion for, without incurring any penalty.

Or elſe having ſerved as an apprentice, will become a journeyman] *M.* 26 *C.* 2. *K.* and *Moor.* The defendant was indicted for uſing the trade of a weaver, not having ſerved as an apprentice ſeven years: the evidence was, he ſerved ſix as an apprentice, and had ſince as journeyman in the ſame trade worked above that time: And by the court, the ſerving of ſeven years is ſufficient either way; and the defendant was found not guilty. 3 *Keb.* 400.

A. An Indenture of a pariſh apprentice; on 43 *El. c.* 2. *ſ.* 1, 5.

THIS indenture made the ——— *day of* ——— *in the year of our Lord* ——— *Between* A. B. *and* C. D. *churchwardens, and* E. F. *and* G. H. *overſeers of the poor of the pariſh of* ——— *in the county of* ——— *of the one part, and* A. M. *of* ——— *in the ſaid pariſh, ſhoemaker, of the other part, witneſſeth, that the ſaid churchwardens and overſeers of the poor, by and with the conſent of* ——— *two of his majeſty's juſtices of the peace for the ſaid county, dwelling near to,* [or, *in*] *the ſaid pariſh of* ——— *one whereof is of the* quorum, *have put, placed and bound, and by theſe preſents do put, place, and bind* A. P. *a poor boy, whoſe parents* B. P. *and* C. P. *are not able to maintain him, of the age of* ——— *years, to be an apprentice with him the ſaid* A. M. *and as an apprentice with him the ſaid* A. M. *to dwell, from the date of theſe preſents, until the ſaid* A. P. *ſhall come to the age of* ——— *years,* [or if a female, *until the ſaid* A. P. *ſhall come to the age of* ——— *years, or the time of her marriage, which ſhall firſt happen*] *according to the ſtatutes in ſuch caſe made and provided. By and during all which time and term, the ſaid* A. P. *ſhall the ſaid* A. M. *his ſaid maſter well and faithfully ſerve, in all ſuch lawful buſineſs as the ſaid* A. P. *ſhall be put unto by the command of his ſaid maſter, according to the power, wit and ability of him the ſaid* A. P. *and honeſtly and obediently in all things ſhall behave himſelf towards his ſaid maſter, and honeſtly and orderly towards the reſt of the* * *family of the ſaid* A. M. *And the ſaid* * 92.
A. M. *for his part, for himſelf, his executors, and adminiſtrators, doth hereby promiſe and covenant to and with the ſaid churchwardens and overſeers of the poor, and every of them, their and every of their executors and adminiſtrators, and their and every of their ſucceſſors for the time being, and to and with the ſaid* A. P. *that he the ſaid* A. M. *ſhall the ſaid* A. P. *in the craft, miſtery, and occupation of a ſhoemaker, which he the ſaid* A. M. *now uſeth, after the beſt manner that he can or may, teach, inſtruct, and inform, or cauſe to be taught, inſtructed, and informed, as much as thereunto belongeth, or in any wiſe appertaineth; and that the ſaid* A. M. *ſhall alſo find and allow unto the ſaid apprentice ſufficient meat, drink, apparel, waſhing, lodging, and all other things needful or meet for an apprentice, during the term aforeſaid. In witneſs whereof the ſaid parties have hereunto ſet their hands and ſeals, the day and year firſt above written.*

Where the overſeers and maſter can agree, other covenants may be inſerted, according to ſuch agreement; but if the maſter is to be compelled,

pelled, it ſeemeth not ſafe to require more from him by the indenture than is above expreſſed.

The aſſent of two juſtices.

WE ——— *two of his majeſty's juſtices of the peace for the abovementioned county of* ——— *dwelling near to the abovementioned pariſh of* ——— *and one of us of the* quorum, *do hereby declare our aſſent to the binding the abovenamed* A. P. *an apprentice to the abovenamed* A. M. *according to the form and effect of the above written indenture. Given under our hands the* ——— *day of*, &c.

B. Warrant to levy 10l. for not receiving a poor apprentice; on the ſtatute of 8 & 9 *W.*

Weſtmorland. } To the conſtables of ———

WHEREAS A. B. *and* C. D. *churchwardens, and* E. F. *and* G. H. *overſeers of the poor of the pariſh of* ——— *in the ſaid county, by the aſſent of* [*us*] ——— *two of his majeſty's juſtices of the peace for the ſaid county dwelling near to,* [or, *in*] *the ſaid pariſh of* ——— *one whereof is of the* quorum, *did endeavour to bind* A. P. *a poor male child of the ſaid pariſh, whoſe parents are not able to maintain him,* * 93. *apprentice to* A. M. *of* ——— *in the ſaid pariſh, taylor, and for that intent did prepare and duly perfect one pair of indentures purſuant to the ſtatute in ſuch caſe made and provided, which ſaid pair of indentures was ſigned and confirmed by* [*us*] *the ſaid two juſtices: And whereas the ſaid* A. M, *is duly convicted before us the juſtices aforeſaid, as well upon the oath of the ſaid* A. B. *as otherwiſe, for that he the ſaid* A. M. *hath refuſed, and doth refuſe to receive and provide for the ſaid* A. P. *as an apprentice, and alſo to execute another part of the ſaid indentures, being duly tendred to him by the ſaid churchwardens and overſeers of the poor, whereby the ſaid* A. M. *hath forfeited the ſum of ten pounds: Theſe are therefore, in his ſaid majeſty's name, to require and command you, to make diſtreſs of the goods and chattels of him the ſaid* A. M. *and if within the ſpace of* [fix] *days next after ſuch diſtreſs by you made, the ſaid ſum of* 10l. *together with reaſonable charges of taking and keeping the ſaid diſtreſs, ſhall not be paid, that then you do ſell the ſaid goods and chattels ſo by you diſtrained, and out of the money ariſing by ſuch ſale, pay the ſaid ſum of* 10l. *to the overſeers of the poor of the ſaid pariſh of* ——— *where the ſaid offence was committed, for the uſe of the poor of the ſaid pariſh; returning the overplus upon demand unto him the ſaid* A. M. *the reaſonable charges of taking, keeping, and ſelling the ſaid diſtreſs being thereout firſt deducted. Herein fail you not. Given under our hands and ſeals the* ——— *day of* ——— *in the year* ———.

Note, as an appeal is given to the ſeſſions, againſt the appointment of an apprentice to be bound to any perſon as aforeſaid; it is proper, either

either not to make out, or not to execute, the warrant of diſtreſs, until after the next ſeſſions.

And it is to be obſerved, that one precedent alone in this caſe is here inſerted, for brevity ſake, as being not in a matter of conſtant practice; but it is to be underſtood, in all ſuch like caſes, that there muſt firſt be a complaint or information in writing, then a ſummons of the party accuſed, or warrant as the caſe may be, and a hearing and determining of the cauſe, and conviction thereupon if the party ſhall be found to be guilty. But as the ſpecial fact muſt be the ſame throughout all the forms of proceedings, it is eaſy from one to frame all the reſt.

* C. Summons of the maſter for miſuſing his apprentice; on 5 *El. c.* 4. * 94.

Weſtmorland. { To the conſtable of ———.

WHEREAS complaint and information hath been made unto me ——— *one of his majeſty's juſtices of the peace in and for the ſaid county, by* A. P. *apprentice to* A. M. *of* ——— *in the ſaid county, ſhoemaker, that the ſaid* A. M. *hath miſuſed and evil intreated him the ſaid* A. P. [*by cruel puniſhment, and beating him the ſaid* A. P. *without juſt cauſe, and by not allowing unto him ſufficient meat, drink, apparel,* or as the caſe ſhall be] *Theſe are therefore in his majeſty's name to command you to ſummon the ſaid* A. M. *to appear before me at the houſe of* ——— *in the ſaid county, on* ——— *the* ——— *day of* ——— *at the hour of* ——— *in the afternoon of the ſame day, to anſwer unto the ſaid complaint; and to be further dealt with according to law. Herein fail you not. Given under my hand and ſeal the* ——— *day of,* &c.

Note, a *ſummons*, rather than a *warrant*, in all ſuch like caſes, between party and party, is generally moſt eligible; yet in this caſe it ſeemeth, that a warrant is juſtifiable to apprehend the maſter, and bring him before the juſtice, (eſpecially if he ſhall contemn the ſummons;) becauſe it is required, that he ſhall give ſecurity to the juſtice to appear at the ſeſſions, if he ſhall not conform to the juſtice's order in the premiſſes.

D. Summons of the apprentice on complaint of the maſter; on the 5 *El. c.* 4.

Weſtmorland. { To the conſtable of ———.

WHEREAS complaint and information hath been made unto me ——— *one of his majeſty's juſtices of the peace in and for the ſaid county, by* A. M. *of* ——— *in the ſaid county, huſbandman, that* A. P. *now being an apprentice to him the ſaid* A. M. *is negligent, ſtubborn, diſorderly,* [or as the caſe ſhall be] *and doth not his duty to*

him the said A. M. *his master; These are therefore to command you to summon the said* A. P. *to appear before me, at* ——— *in the said county on* —— *the* —— *day of* —— *at the hour of* —— *in the afternoon of the same day, to answer to the said complaint, and to be further* * *dealt with according to law. Herein fail not. Given under my hand and seal the* ——— *day of*, &c.

* 95.

E. Order of discharge by four justices at the sessions; on the 5 *El. c.* 4. *s.* 35.

Westmorland. *AT a general quarter sessions of the peace holden at* ——— *in and for the county aforesaid, the* ——— *day of* ——— *in the* ——— *year of the reign of our lord* George *the third, by the grace of God of* Great Britain, France, *and* Ireland, *king, defender of the faith, and so forth; Before* ——— *justices of our said lord the king, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, and of the* quorum, *It is ordered as followeth:*

Upon the petition of A. P. *apprentice to* A. M. *of* ——— *in the said county, husbandman, to be relieved upon certain neglects of the said master in instructing him in his trade, and in misusing and evil intreating the said apprentice by cruel punishment* [or as the case shall be]; *and the said master having likewise appeared upon his recognizance taken before* J. P. *esquire, one of the said justices, to answer to the complaint of the said petition, and having proved nothing whereby to clear himself of the said complaint; but on the contrary, the said* A. P. *having given full proof of the truth of the said complaint to the satisfaction of the said court: We therefore, whose hands and seals are hereunto set, being four of the said justices, and of the* quorum, *do hereby order, pronounce, and declare, that the said apprentice shall be, and is hereby discharged and freed from his said apprenticehood: And this to be a final order betwixt the said master and apprentice, any thing contained in their indentures of apprenticeship, or otherwise, to the contrary notwithstanding. Given under our hands and seals the day and year first above written.*

F. Complaint of an apprentice to two justices against his master; on 20 G. 2. *c.* 19.

Westmorland. *THE information and complaint of* A. P. *apprentice to* A. M. *of* ——— *in the said county, husbandman, exhibited before us two of his majesty's justices of the peace in and for the said county, the* ——— *day of* ——— *in the year*, &c.

* 96. * *Who saith, that he the said* A. P. *is an apprentice bound by indenture to* A. M. *of* ——— *aforesaid, husbandman; and that he the said*

ſaid A. M. *hath miſuſed and ill treated him the ſaid apprentice, and particularly* [as the caſe ſhall be.]

A. P.

Before us,

J. P.
K. P.

G. Summons of the maſter by two juſtices, on complaint of the apprentice; on the 20 *G.* 2. *c.* 19. *ſ.* 3.

Weſtmorland. { To the conſtable of ———.

WHEREAS information and complaint hath been made unto us ——— *two of his majeſty's juſtices of the peace in and for the ſaid county, by* A. P. *apprentice to* A. M. *of* ——— *in the ſaid county, huſbandman, that he the ſaid* A. M. *hath miſuſed and ill-treated him the ſaid* A. P. *and particularly* [as the caſe ſhall be:] *Theſe are therefore to require you to ſummon the ſaid* A. M. *to appear before us at* ——— *in the ſaid county, on* ——— *the* ——— *day of* ——— *to anſwer unto the ſaid information and complaint. And be you then there to certify what you ſhall have done in the execution hereof. Herein fail you not. Given under our hands and ſeals the* ——— *day of* ——— *in the year* ———.

H. Diſcharge of an apprentice by two juſtices, on the maſter miſuſing him, by the 20 *G.* 2. *c.* 19. *ſ.* 3.

Weſtmorland. *WHEREAS complaint hath been made before us* ——— *two of his majeſty's juſtices of the peace in and for the ſaid county, by* A. P. *apprentice to* A. M. *of* ——— *in the ſaid county, taylor, that he the ſaid* A. M. *hath miſuſed and evil treated him the ſaid apprentice, and particularly* [as the caſe ſhall be]: *And whereas the ſaid* A. M. *hath appeared before us in purſuance of our ſummons to that purpoſe, but hath not cleared himſelf of and from the ſaid accuſation and complaint, but on the contrary the ſaid* A. P. *hath made full proof of the truth thereof before us upon oath; We therefore by theſe preſents do diſcharge him the ſaid* A. P. *of and from his apprenticeſhip to the ſaid* A. M. *any thing in the indenture of apprenticeſhip made* * *betwixt them, or otherwiſe howſoever, to the contrary notwithſtanding. Given under our hands and ſeals the* ——— *day of*, &c. * 97.

[Or, *And whereas it hath been duly proved before us, as well upon the oath of* A. C. *conſtable of* ——— *aforeſaid, as otherwiſe, that he the ſaid* A. C. *did duly ſummon the ſaid* A. M. *to appear before us at a reaſonable time in the ſaid ſummons mentioned and ſpecified; but notwithſtanding the ſame, he the ſaid* A. M. *hath not appeared before us according to ſuch ſummons: We therefore having duly examined into the matter of the ſaid complaint, and the truth thereof having been fully proved before us upon oath, do diſcharge*, &c.]

I. Complaint

I. Complaint to two juſtices of the maſter againſt his apprentice; on the 20 *G.* 2. *c.* 19. *ſ.* 4.

Weſtmorland. *THE complaint and information of* A. M. *of* ——— *in the ſaid county, huſbandman, taken and made on oath before us* ——— *two of his majeſty's juſtices of the peace in and for the ſaid county, the* ——— *day of* ——— *Who ſaith, that* A. P. *apprentice by indenture to him the ſaid* A. M. *hath in the ſervice of his apprenticeſhip been guilty of ſeveral miſdemeanors, miſcarriages and ill behaviour towards him the ſaid* A. M. *and particularly* [as the caſe ſhall be.]

A. M.

Before us,

J. P.
K. P.

K. Warrant for a diſorderly apprentice, by two juſtices; on the aforeſaid complaint by the 20 *G.* 2. *c.* 19. *ſ.* 4.

Weſtmorland. { To the conſtable of ———.

WHEREAS oath hath been made before us ——— *two of his majeſty's juſtices of the peace in and for the ſaid county, by* A. M. *of* ——— *in the ſaid county, huſbandman, that* A. P. *apprentice to the ſaid* A. M. *hath committed divers miſdemeanors againſt the ſaid* A. M. *his maſter, and particularly* [as the caſe ſhall be]; *Theſe are therefore to require you forthwith to apprehend the ſaid* A. P. *and bring him before us, to anſwer unto the ſaid complaint, and to be dealt with according to law: And you are to give notice to the*
* 98. *ſaid* * A. M. *that he appear before us at the ſame time, to make good the ſaid complaint. Given under our hands and ſeals,* &c.

L. Commitment of an apprentice to the houſe of correction, on complaint of his maſter, by two juſtices; on the 20 *G.* 2. *c.* 19. *ſ.* 4.

Weſtmorland. { To the conſtable of ——— in the ſaid county, and to the keeper of the houſe of correction at ——— in the ſaid county.

WHEREAS complaint hath been made before us ——— *two of his majeſty's juſtices of the peace in and for the ſaid county, upon the oath of* A. M. *of* ——— *in the ſaid county, huſbandman, that* A. P. *apprentice of the ſaid* A. M. *hath committed divers miſdemeanors againſt him the ſaid* A. M. *his maſter, and particularly* [as the caſe ſhall be]: *And whereas upon examination thereof, and upon hearing the allegations of both parties, having come before us for that purpoſe, and upon due conſideration had thereof, it manifeſtly appears to us that he the ſaid* A. P. *is guilty of the premiſſes ſo charged againſt*

againſt him as aforeſaid: We do therefore hereby command you the ſaid conſtable to take and convey the ſaid A. P. *to the ſaid houſe of correction, and to deliver him to the ſaid keeper thereof, together with this warrant: And we do hereby command you the ſaid keeper of the ſaid houſe of correction, to receive the ſaid* A. P. *into your cuſtody in the ſaid houſe of correction, there to remain and be corrected, and held to hard labour for the ſpace of* ———. *Given under our hands and ſeals, the* ——— *day, &c.*

M. Diſcharge of an apprentice by two juſtices, on complaint of the maſter; by 20 G. 2. c. 19. ſ. 4.

Weſtmorland. *WHEREAS complaint,* &c. (as in the laſt precedent) —— *We do therefore by theſe preſents diſcharge the ſaid* A. P. *from his apprenticeſhip to the ſaid* A. M. *any thing in any indenture or indentures of apprenticeſhip betwixt them, or otherwiſe, to the contrary notwithſtanding. Given,* &c.

* N. Aſſignment of an apprentice. * 99.

TO all to whom theſe preſents ſhall come: I A. M. *of* ——— *ſend greeting. Whereas my apprentice* A. P. *hath divers years yet to come and unexpired of his apprenticeſhip, to wit,* ——— *whole years from the* ——— *day of* ——— *now laſt paſt, as by his indenture of apprenticeſhip to me ſealed doth appear: Now know ye, that I the ſaid* A. M. *for divers good cauſes and conſiderations me hereunto moving, have given, granted, aſſigned, and ſet over, and by theſe preſents do fully and abſolutely give, grant, aſſign, and ſet over, unto* A. S. *of* ——, *all ſuch right, title, duty, term of years to come, ſervice and demand whatſoever, which I the ſaid* A. M. *have in or to the ſaid* A. P. *or which I may or ought to have in him by force and virtue of the ſaid indenture of apprenticeſhip. And moreover, I the ſaid* A. M. *do by theſe preſents covenant, promiſe, and agree to and with the ſaid* A. S. *his executors and adminiſtrators, that notwithſtanding any thing by me the ſaid* A. M. *to be done to the contrary, the ſaid* A. P. *ſhall, during the ſaid term of* ———*years, well and truly ſerve the ſaid* A. S. *as his maſter, and his commandments lawful and honeſt ſhall do, and from his ſervice ſhall not abſent himſelf during the ſaid term. Provided, that the ſaid* A. S. *ſhall well intreat and uſe him the ſaid* A. P. *and him the ſaid* A. P. *in the craft, miſtery, and occupation of a* —— *which he the ſaid* A. S. *now uſeth, after the beſt manner that he can or may, ſhall teach, inſtruct, and inform, or cauſe to be taught, inſtructed, and informed, as much as thereunto belongeth, or in any wiſe appertaineth, and ſhall alſo during the ſame term find and allow unto the ſaid* A. P. *ſufficient meat, drink, apparel, waſhing, lodging, and all other things needful or meet for an apprentice. In witneſs, &c.*

APPROVER.

AN *approver* (probator) is a perſon indicted of treaſon or felony, and in priſon for the ſame, who upon his arraignment, before any plea pleaded, doth confeſs the indictment, and takes a corporal oath to reveal all treaſons and felonies that he knoweth of, and therefore prays a coroner, before whom he is to enter his appeal or accuſation, againſt thoſe that are partners in the crime contained in the indictment. 3 *Inſt.* 129.

* 100 * This accuſation of himſelf, and oath, makes his accuſation of another perſon of the ſame crime, to amount to an indictment; and if his partners are convicted, he ſhall have his pardon of courſe. 3 *Inſt.* 129, 130.

But juſtices of the peace cannot take cognizance hereof, becauſe they have no authority by their commiſſion to aſſign a coroner. 3 *Inſt.* 130.

And beſides, as it is in the diſcretion of the court, whether they will ſuffer one to be an approver, this method of late hath been ſeldom practiſed: And in many caſes we have what ſeems to amount to the ſame, by ſtatute; where pardon is aſſured to offenders, on diſcovering and convicting their accomplices.

Arbitration. See *AWARD.*
Army. See *SOLDIERS and MILITIA.*
Arrack. See *EXCISE.*

ARRAIGNMENT.

WHEN an offender comes into court, or is brought in by proceſs, ſometimes of *capias*, and ſometimes of *habeas corpus* directed to the gaoler of another priſon; the firſt thing that follows thereupon, is his arraignment. 2 *H. H.* 216.

Now arraignment is nothing elſe but the calling the offender to the bar of the court, to anſwer the matter charged upon him. 2 *H. H.* 216.

And the word in Latin (lord *Hale* ſaith) is no other than *ad rationem ponere*, and in French *ad reſon*, or abbreviated *a reſn*; for as the ancient word *diſrain* or *derayn* imports in Latin *diſrationare*, to diſprove or evince the contrary of any thing that is or may be affirmed, ſo *arraigne* is *ad rationem ponere*, to call to account or anſwer. 2 *H. H.* 216. And this perhaps may be ſufficient to ſhew the meaning of the word, altho' not to declare its derivation; for it ſeemeth to have flowed unto the French tongue, from its common origin with the Greek; of which we ſhall have little doubt, when we conſider the verbs ἀγορευειν, καταγορειν, and alſo διαγορευειν, as they are uſed in the claſſical remains of that language, and compare them with the terms *arraigne*, *adraigne*, *diſrayn*, *derayne*.

The priſoner on his arraignment, tho' under an indictment of the
101 * higheſt crime, muſt be brought to the bar * without irons and all manner of ſhackles or bonds, unleſs there be a danger of eſcape, and then he may be brought with irons. 2 *H. H.* 219.

Alſo there is no neceſſity that a priſoner, at the time of his arraignment, hold up his hand at the bar, or be commanded ſo to do; for this

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is only a ceremony for making known the perſon of the offender to the court; and if he anſwers that he is the ſame perſon, it is all one. 2 *Haw.* 308.

ARREST.

THIS is to be underſtood of arreſts in criminal caſes only, and not in civil caſes.

The word *arreſt* is the ſame, with very little variation, in the Engliſh, French, German, Belgic, and other languages of the weſtern empire, heretofore ſubject to the Roman power; and probably may have been derived unto us thro' the channels both of France and Saxony: the French *arreſter* ſignifieth to ſtop or ſtay; and the Saxon *reſtan* to reſt; and both perhaps have ſprung from the Italian *arreſto*, and that from the well known Latin verb *ſto*, to ſtand.

And, in law, an arreſt doth ſignify the reſtraint of a man's perſon, depriving him of his own will and liberty, and binding him to become obedient to the will of the law: And it may be called the beginning of impriſonment. *Lamb.* 93.

Concerning which I will ſhew,

I. Who may or may not be arreſted.
II. For what cauſes of ſuſpicion an arreſt may be.
III. By whom the arreſt ſhall be made.
IV. The manner of an arreſt.
V. What is to be done after the arreſt.

I. Who may or may not be arreſted.

Privilege of parliament.

1. Generally, a member of parliament ſhall have the privilege of parliament for himſelf and his ſervants to be freed from arreſts: but for treaſon, felony, and breach of the peace there can be no privilege. 4 *Inſt.* 24, 25.

Peers and bodies corporate.

2. In caſes of peers and corporations, the proceſs is a diſtringas, for they cannot be arreſted. 3. *Salk.* 46.

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Perſons charged in execution.

* 3. In the caſe of *K.* and *Woodham. H.* 2 *G.* 2. upon a motion for an information againſt the defendant, who was a juſtice of the peace; it was held, that a perſon in execution in the king's bench may be there charged criminally by a juſtice of the peace's warrant: but that no ſuch juſtice can take a priſoner of this court out of the cuſtody of the court, and ſend him to the county gaol. *Str.* 828.

In churchyards.

4. None ſhall arreſt prieſts or their clerks, or other perſons of holy church, whilſt they attend to divine ſervice, in churches, churchyards, or other places dedicated to God; on pain of impriſonment and ranſom at the king's will, and he ſhall alſo make gree to the parties arreſted. 50 *Ed.* 3. c. 5. 1 *R.* 2. c. 15.

On Sundays. 5. Alſo a warrant executed againſt any perſon whatſoever, on the Lord's day, is void; and the perſons ſerving the ſame ſhall ſuffer damages, as if they had done the ſame without warrant; except in caſes of treaſon, felony, and breach of the peace. 29 *C.* 2. *c.* 7. *ſ.* 6.

II. *For what cauſes of ſuſpicion an arreſt may be.*

Suſpicion. By the ſtatute of 34 *Ed.* 3. *c.* 1. Power is given to the juſtices of the peace, to arreſt all thoſe whom they find by indictment, or by *ſuſpicion*, and to put them in priſon.

Cauſes of ſuſpicion. And the cauſes of ſuſpicion, which are generally agreed to juſtify the arreſt of an innocent perſon for felony, are theſe that follow:

Common fame. (1) The common fame of the country; but it ſeems, that it ought to appear upon evidence, in an action brought for ſuch arreſt, that ſuch fame had ſome probable ground. 2 *Haw.* 76.

Circumſtances of guilt. (2) The being found in ſuch circumſtances, as induce a ſtrong preſumption of guilt: as coming out of a houſe wherein murder hath been committed, with a bloody knife in one's hand; or being found in poſſeſſion of any part of goods ſtolen, without being able to give a probable account of coming honeſtly by them. 2 *Haw.* 76.

Flight. (3) The behaving one's ſelf in ſuch a manner as betrays a conſciouſneſs of guilt; as where a man accuſed of felony, on hearing that a warrant is taken out againſt him, doth abſcond. 2 *Haw.* 76.

But the party who flies from an arreſt for a capital offence, is not thereby guilty of a capital offence, but only liable to forfeit his goods, when ſuch flight is found againſt him. 2 *Haw.* 122.

*103 *Evil company.* (4) The being found in company with one known to be an offender, at the time of the offence, or generally at * other times keeping company with perſons of ſcandalous reputation. 2 *Haw.* 76. 2 *Inſt.* 52.

Living idle. (5) the living an idle, vagrant, and diſorderly life, without having any viſible means to ſupport it. 2 *Haw.* 76.

Hue and cry. (6) The being purſued by hue and cry. 2 *Haw.* 76.

For if a felony is done, and one is purſued upon hue and cry, that is not of ill fame, ſuſpicious, unknown, nor indicted; he may be attached and impriſoned by the law of the land. 2 *Inſt.* 52.

Where no crime is committed. (7) But generally, no ſuch cauſe of ſuſpicion, as any of the abovementioned, will juſtify an arreſt, where in truth no ſuch crime hath been committed; unleſs it be in the caſe of hue and cry. 2 *Haw.* 76.

In the caſe of *Samuel* againſt *Payne* and others, *E.* 20. *G.* 3. The plaintiff *Samuel* brought an action of treſpaſs and falſe impriſonment againſt *Payne* a conſtable and two others. The facts were theſe: *Hall*, one of the defendants, charged the plaintiff with having ſtolen ſome laces from him, which he ſaid were in the plaintiff's houſe. A ſearch

warrant

warrant was granted by a juſtice upon this charge, but there was no warrant to apprehend him. On the ſearch, the goods were not found; however, *Payne*, *Hall*, and the other defendant an aſſiſtant of *Payne*, arreſted the plaintiff and carried him before a magiſtrate, who upon examination diſcharged him. The cauſe was tried before lord *Mansfield*, and a verdict found againſt all the three defendants. At the trial, his lordſhip, and the counſel on both ſides, looked upon the rule of law to be, that if a felony hath actually been committed, any man, upon reaſonable probable grounds of ſuſpicion, may juſtify apprehending the ſuſpected perſon to carry him before a magiſtrate; but that, if no felony has been committed, the apprehending of a perſon ſuſpected cannot be juſtified by any one. His lordſhip therefore left it to the jury to conſider, whether any felony had been committed. The rule, however, was conſidered as inconvenient and narrow, becauſe if a man charges another with felony, and requires an officer to take him into cuſtody, and carry him before a magiſtrate, it would be moſt miſchievous that the officer ſhould be bound firſt to try, and at his peril exerciſe his judgment on the truth of the charge. He that makes the charge ſhould alone be anſwerable. The officer doth his duty in carrying the accuſed before a magiſtrate, who is authorized to examine, and commit or diſcharge. On this ground, a motion was made for a new trial; and, after cauſe ſhewn, the court held, that the * charge was a ſufficient *104 juſtification to the conſtable and his aſſiſtant, and the rule for a new trial was made abſolute. Which new trial came on before lord *Mansfield*, at the ſittings after this term; when a verdict was found againſt *Hall*, and for the other two defendants. *Douglas.* 345.

III. By whom the arreſt ſhall be made.

Arreſt without warrant.

1. In criminal caſes, a perſon may be apprehended and reſtrained of his liberty, not only by proceſs out of ſome court, or warrant from a magiſtrate, but frequently by a conſtable, watchman, or private perſon, without any warrant or precept.

By private perſons.

2. Thus all perſons, who are preſent when a felony is committed, or a dangerous wound given, are bound to apprehend the offender, on pain of being fined and impriſoned for their neglect. 2. *Haw.* 74.

Alſo, every private perſon is bound to aſſiſt an officer demanding his help, for the taking of a felon, or the ſuppreſſing of an affray. 2 *Haw.* 75.

Alſo by the vagrant act of 17 *G.* 2. Every private perſon may apprehend beggars and vagrants.

By watchmen.

3. Alſo, a watchman may arreſt a night walker, without any warrant from a magiſtrate. 2 *Inſt.* 52.

By conſtables.

4. In like manner, a conſtable may *ex officio* arreſt a breaker of the peace in his view, and keep him in his houſe, or in the ſtocks till he can bring him before a juſtice. 1 *H. H.* 587.

By others.

5. Or any perſon whatſoever, if an affray be made to the breach of the king's peace, may without any

warrant from a magiſtrate, reſtrain any of the offenders, to the end the king's peace may be kept; but after the affray is ended, they cannot be arreſted without an expreſs warrant. 2 *Inſt.* 52.

Arreſt with warrant.

6. So much concerning an arreſt without a warrant; next follows arreſting with ſuch warrant:

By the ſheriff or conſtable.

7. the warrant is ordinarily directed to the ſheriff or conſtable, and they are indictable, and ſubject thereupon to a fine and impriſonment, if they neglect or refuſe it. 1 *H. H.* 581.

Sheriff may depute.

8. If it be directed to the ſheriff, he may command his bailiff, under ſheriff, or other ſworn and known officer, to ſerve it, without writing any precept. But if he will command another man, that is no ſuch officer, to ſerve it, he muſt give him a written precept, otherwiſe falſe impriſonment will lie. *Lamb.* 89.

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Others cannot depute.

*9. But every other perſon to whom it is directed, muſt perſonally execute it; yet it ſeems, that any one may lawfully aſſiſt him. 2 *Haw.* 86.

Where a conſtable may execute it out of his own diſtrict.

10. If a warrant be generally directed to all conſtables, no one can execute it out of his own precinct; for in ſuch caſe it ſhall be taken reſpectively to each of them within their ſeveral diſtricts, and not to one of them to execute it within the diſtrict of another; but if it be directed to a particular conſtable (Mr. *Hawkins* ſays, to a particular conſtable *by name*), he may execute it any where within the juriſdiction of the juſtice, but is not compellable to execute it out of his own conſtablewick. Lord *Raym.* 546. 1 *H. H.* 581. 2 *H. H.* 110. 2 *Haw.* 86.

Any perſon may execute.

11. The juſtice that iſſues the warrant, may direct it to a private perſon if he pleaſeth, and it is good; but he is not compellable to execute it, unleſs he be a proper officer. 1 *H. H.* 581.

But not to be directed to the party.

12. But by the juſtices oath of office, the warrant ought not to be directed to the party, but to ſome indifferent perſon, to execute it.

Where directed to two jointly.

13. If a warrant is directed to two or more jointly, yet any one of them alone may execute it. *Dalt. c.* 169.

IV. The manner of an arreſt.

To be gone about immediately.

1. The officer to whom a warrant is directed and delivered, ought with all ſpeed and ſecrecy to find out the party, and then to execute the warrant. *Dalt. c.* 169.

Oppoſing the execution.

2. It is certainly an offence of a very high nature, to oppoſe one who lawfully endeavours to arreſt another for treaſon or felony: and it ſeems, that a perſon who ſo oppoſes an arreſt for treaſon, whereof he knows the party to have been guilty, is thereby guilty of the treaſon; and that he who ſo oppoſes an arreſt for felony, is an acceſſary to the felony. *Haw.* 121.

3. An

3. An arreſt in the night is good, both at the ſuit of the king and of the ſubject; elſe the party may eſcape. 9 *Co.* 66. *Arreſting in the night.*

4. By the 24 *G.* 2. *c.* 55. Conſtables and others may, on having the warrant indorſed by a juſtice in another county, into which an offender ſhall have eſcaped, arreſt an offender in ſuch other county, and carry him before the juſtice who indorſed the warrant, or ſome other juſtice or juſtices of ſuch other county, if the offence is bailable, to find bail; or elſe ſhall carry him back again before a juſtice in the county from whence the warrant did firſt iſſue. *Arreſting in another county.*

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* 5. A private perſon cannot raiſe power to arreſt or detain a felon. *H. H.* 601. *Taking the power of the county.*

But any juſtice, or the ſheriff, may take of the county any number that he ſhall think meet, to purſue, arreſt, and impriſon traitors, murderers, robbers, and other felons; or ſuch as do break, or go about to break, or diſturb the king's peace: and every man being required, ought to aſſiſt and aid them, on pain of fine and impriſonment. *Dalt. c.* 171.

But it is not juſtifiable for a juſtice, ſheriff, or other officer, to aſſemble the *poſſe comitatus*, or raiſe a power or aſſembly of people, upon their own heads, without juſt cauſe. *Dalt. c.* 171.

But where a juſtice, ſheriff, or other officer, is enabled to take the power of the county, it ſeemeth they may command and ought to have the aid and attendance of all knights, gentlemen, yeomen, huſbandmen, labourers, tradeſmen, ſervants, and apprentices, and of all other perſons being above the age of fifteen years, and able to travel. *Dalt. c.* 171. Becauſe, by the ſtatute of *Wincheſter*, all of that age are bound to have harneſs.

But women, eccleſiaſtical perſons, and ſuch as be decrepit, or diſeaſed, ſhall not be compelled to attend them. *Dalt. c.* 171.

And in ſuch caſe it is referred to the diſcretion of the juſtice, ſheriff, or other officer, what number they will have to attend on them, and how and after what manner they ſhall be armed or otherwiſe furniſhed. *Dalt. c.* 171.

6. As to the caſe of breaking open doors, in order to apprehend offenders, it is to be obſerved, that the law doth never allow of ſuch extremities, but in caſes of neceſſity; and therefore, that no one can juſtify the breaking open another's door to make an arreſt, unleſs he firſt ſignify to thoſe in the houſe the cauſe of his coming, and requeſt them to give him admittance. 2 *Haw.* 86. *Breaking open doors.*

But where a perſon authorized to arreſt another, who is ſheltered in a houſe, is denied quietly to enter into it, in order to take him; it ſeems generally to be agreed, that he may juſtify breaking open the doors in the following inſtances:

(1) Upon a *capias* grounded on an indictment for any crime whatſoever; or upon a *capias* from the chancery or king's bench, to compel a man to find ſureties for the peace or good behaviour. 2 *Haw.* 86.

(2) When one known to have committed a treaſon or felony, or to have given another a dangerous wound, is purſued either with or without a warrant, by a conſtable * or private perſon; but where one lies under a probable

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a probable ſuſpicion only, and is not indicted, it ſeems the better opinion at this day (Mr. *Hawkins* ſays) that no one can juſtify the breaking open doors in order to apprehend him: And this opinion he founds on *Coke's* 4 *Inſt.* 177. and *Hale's pleas of the crown.* 91. 2 Haw. 87.

But Lord *Hale*, in his hiſtory of the pleas of the crown, ſays, that upon a warrant for probable cauſe of ſuſpicion of felony, the perſon to whom ſuch warrant is directed, may break open doors to take the perſon ſuſpected, if upon demand he will not ſurrender himſelf, as well as if there had been an expreſs and poſitive charge againſt him; and ſo (he ſays) hath the common practice obtained, notwithſtanding the contrary opinion of lord *Coke:* for in ſuch caſe the proceſs is for the king, and therefore a *non omittas* is implied. 1 *H. H.* 580, 583. 2 *H. H.* 117.

And as he may break open ſuch perſon's own houſe, ſo much more may he break open the houſe of another to take him; for ſo the ſheriff may do upon a civil proceſs: But then he muſt at his peril ſee that the felon be there; for if the felon be not there, he is a treſpaſſer to the ſtranger whoſe houſe it is. 2 *H. H.* 117.

But it ſeems that he that arreſts as a *private man* barely upon ſuſpicion of felony, cannot juſtify the breaking open of doors to arreſt the party ſuſpected, but he doth it at his peril, that is, if in truth he be a felon, then it is juſtifiable, but if he be innocent, but upon a reaſonable cauſe ſuſpected, it is not juſtifiable. 1 *H. H.* 82.

But a *conſtable* in ſuch caſe may juſtify, and the reaſon of the difference is this: becauſe that in the former caſe it is but a thing permitted to private perſons to arreſt for ſuſpicion, and they are not puniſhable if they omit it; and therefore they cannot break open doors; but in caſe of a conſtable he is puniſhable if he omit it upon complaint. 2 *H. H.* 92.

(3) Upon a warrant from a juſtice of the peace, to find ſureties for the peaec or good behaviour. 2 *Haw.* 86. 1 *H. H.* 582. 2 *H. H.* 117.

And in general, Mr. *Dalton* ſays, an officer upon any warrant from a juſtice, either for the peace or good behaviour, or in any caſe where the king is party, may by force break open a man's houſe, to arreſt the offender. *Dalt. c.* 169.

(4) On a warrant to ſearch for ſtolen goods, the doors may be broke open, if the goods are there; and if they are not there, the conſtable ſeems indemnified, but he that made the ſuggeſtion, is puniſhable. 2 *H. H.* 151.

*108 * (5) Where forcible entry or detainer is found by inquiſition before juſtices of the peace, or appears on their view. 2 *Haw.* 86.

(6) On a *capias utlagatum*, or *capias pro fine.* 2 Haw. 86.

(7) On the warrant of a juſtice of the peace for the levying of a forfeiture, in execution of a judgment, or conviction for it, grounded on any ſtatute, which gives the whole or any part of ſuch forfeiture to the king. 2 *Haw.* 86.

(8) Where an affray is made in a houſe, in the view or hearing of the conſtable, he may break open the doors to take them. 1 *Haw.* 137. 2 *Haw.* 87.

(9) If

(9) If there be diſorderly drinking or noiſe in a houſe, at an unſeaſonable time of night, eſpecially in inns, taverns, or alehouſes, the conſtable or his watch, demanding entrance, and being refuſed, may break open the doors, to ſee and ſuppreſs the diſorder. 2 *H. H.* 95.

(10) Wherever a perſon is lawfully arreſted for any cauſe, and afterwards eſcapes, and ſhelters himſelf in an houſe. 2 *Haw.* 87.

(11) But upon a general warrant, without expreſſing any felony or treaſon, or ſurety of the peace, the officer cannot break open a door. 1 *H. H.* 584.

(12) Neither ought doors to be broke open to take a perſon, who is required to take certain oaths by virtue of a ſtatute, becauſe in ſuch caſe the warrant is not grounded on a precedent offence. 2 *Haw.* 87. 12 *Co.* 131.

(13) In a civil ſuit; the officer cannot juſtify the breaking open an outward door or window in order to execute proceſs. If he doth, he is a treſpaſſer. But if he findeth the outward door open, and entreth that way, or if the door be opened to him from within, and he entreth, he may break open inward doors if he findeth that neceſſary in order to execute his proceſs. *Foſt.* 319.

For a man's houſe is his caſtle for ſafety and repoſe for himſelf and family; but if a ſtranger, who is not of the family, upon a purſuit taketh refuge in the houſe of another, this rule doth not extend to *him*, it is not *his* caſtle, he cannot claim the benefit of ſanctuary therein. *Foſt.* 320.

And it is always to be remembred, that this rule muſt be confined to the caſe of arreſt upon proceſs in civil ſuits only. For where a felony hath been committed, or a dangerous wound given, or even where a miniſter of juſtice cometh armed with proceſs founded on a breach of the peace; the party's own houſe is no ſanctuary for him: * in theſe *109
caſes, the juſtice which is due to the publick muſt ſuperſede every pretence of private inconvenience. *id.*

(14) Finally, in all theſe caſes, if an officer, to ſerve any warrant, enters into a houſe, the doors being open, and then the doors are locked upon him, he may break them open in order to regain his liberty. 2 *Haw.* 87.

7. If there be a warrant againſt a perſon, for a treſpaſs or breach of the peace, and he flies and will not yield to the arreſt, or being taken makes his eſcape; if the officer kills him it is murder. 2 *H. H.* 117. *Killing in the arreſt or purſuit.*

But if ſuch perſon, either upon the attempt to arreſt, or after the arreſt, aſſault the officer, to the intent to make his eſcape from him, and the officer ſtanding upon his guard kills him, this is no felony; for he is not bound to go back to the wall as in common caſes of *ſe defendendo*, for the law is his protection. 2 *H. H.* 118.

But where a warrant iſſueth againſt a perſon for felony, and either before arreſt, or after, he flies and defends himſelf with ſtones or weapons, ſo that the officer muſt give over his purſuit, or otherwiſe cannot take him without killing him, if he kill him it is no felony, And the ſame law is, for a conſtable that doth it by virtue of his office, or on hue and cry. 2 *H. H.* 118.

But

But then there must be these cautions: 1. He must be a lawful officer; or there must be a lawful warrant. 2. The party ought to have notice of the reason of the pursuit, namely, because a warrant is against him. 3. It must be a case of necessity, and that not such a necessity as in the former case, where an assault is made upon the officer; but this is the necessity, namely, that he cannot otherwise be taken. 2 *H. H.* 119.

But tho' a private person may arrest a felon; and if he fly so as he cannot be taken without he be killed, it is excusable in this case for the necessity; yet it is at his peril, that the party be a felon; for if he be innocent of the felony, the killing (at least before the arrest) seems at least manslaughter; for an innocent person is not bound to take notice of a private person's suspicion. 2 *H. H.* 119.

Whether the constable need to shew his warrant.

8. A person sworn and commonly known, and acting within his own precinct, need not shew his warrant; but he ought to acquaint the party with the substance of it. 2 *Haw.* 85.

And an officer giveth sufficient notice what he is, when he saith to the party, I arrest you in the king's name; and in such case, the party at his peril ought to obey him, tho' he knoweth him not to be
*110 an officer; and if he have * no lawful warrant, the party grieved may have his action of false imprisonment. *Dalt. c.* 169.

But the learned editor of *Hale*'s history observes hereupon, that the books referred to intend the general warrant constituting such person an officer, as a bailiff, or the like, in a civil action; tho' it may be otherwise in case of felony, because in such case a private person may arrest a felon without any warrant at all. 2 *H. H.* 116.

But if he acts out of his precinct, or is not sworn and commonly known, he must shew his warrant if demanded. 2 *Haw.* 85, 86. Otherwise the party may make resistance, and needs not to obey it. *Dalt. c.* 169.

But if the constable has no warrant, but doth it by virtue of his office, as a constable, it is sufficient to notify that he is constable, or that he arrests in the king's name. 1 *H. H.* 583.

But in the case of a warrant of distress, issued by a justice of the peace, for the levying a pecuniary forfeiture or sum of money, it is specially provided by the statute of the 27 *G.* 2. *c.* 20. that the officer executing the same, shall, if required, shew his warrant to the person whose goods are distrained, and shall suffer a copy thereof to be taken.

No arrest by words only.

9. If the constable come unto the party, and require him to go before the justice, this is no arrest nor imprisonment. *Dalt. c.* 170.

For bare words will not make an arrest without laying hold on the person or otherwise confining him. But if an officer comes into a room, and tells the party he arrests him, and locks the door, this is an arrest; for he is in custody of the officer. 1 *Salk.* 79. 2 *Haw.* 129. *Cases in the time of lord Hardwicke.* 31.

10. It

10. It hath been holden, that if a conſtable, after he hath arreſted the party by force of a warrant, ſuffer him to go at large, upon his promiſe to come again and find ſureties, he cannot afterwards arreſt him by force of the ſame warrant: However if the party return, and put himſelf again under the cuſtody of the conſtable, it ſeems that it may be probably argued, that the conſtable may lawfully detain him, and bring him before the juſtice, in purſuance of ſuch warrant; but in this the law doth not ſeem to be clearly ſettled. 2 *Haw.* 81. *Retaking after arreſt.*

But if the party arreſted do eſcape, the officer upon freſh ſuit may take him again and again, ſo often as he eſcapeth, altho' he were out of view, or that he ſhall fly into another town or country. *Dalt. c.* 169.

* *V. What is to be done after the arreſt.* *III

1. When a private perſon hath arreſted a felon, or one ſuſpected of felony, he may detain him in cuſtody till he can reaſonably diſmiſs himſelf of him; but with as much ſpeed as conveniently he can, he may do any of theſe three things: *By a private perſon.*

(1) He may carry him to the common gaol; but that is now rarely done. 1 *H. H.* 589. 2 *H. H.* 77.

(2) He may deliver him to the conſtable, who may either carry him to gaol, or to a juſtice of the peace. 1 *H. H.* 589.

(3) He may carry him immediately to a juſtice of the peace. 1 *H. H.* 589.

2. If the conſtable, or his watch, hath arreſted affrayers, or perſons drinking in an alehouſe diſorderly at an unſeaſonable time of night, he may put the perſons in the ſtocks, or in a priſon if there be one in the vill, till the heat of their paſſion or intemperance is over, tho' he deliver them afterwards; or till he can bring them before a juſtice. 2 *H. H.* 95. *By a watchman.*

3. If the arreſt is by virtue of a warrant, when the officer hath made the arreſt, he is forthwith to bring the party, according to the direction of the warrant: If it be to bring the party before the juſtice who granted the warrant ſpecially, then the officer is bound to bring him before the ſame juſtice; but if the warrant be to bring him before any juſtice of the county, then it is in the election of the officer, to bring him before what juſtice he thinks fit, and not in the election of the priſoner. 1 *H. H.* 582. 2 *H. H.* 112. *By an officer by warrant.*

But if the time be unſeaſonable, as in or near the night whereby he cannot attend the juſtice, or if there be danger of a preſent reſcue, or if the party be ſick, he may ſecure him in the ſtocks, or in an houſe, till the next day, or ſuch time as it may be reaſonable to bring him. 2 *H. H.* 120.

And when he hath brought him to the juſtice, yet he is in law ſtill in his cuſtody, till the juſtice diſcharge, or bail, or commit him. 2 *H. H.* 120.

Returning the warrant.

4. But it is ſaid, the conſtable is not obliged to return the warrant itſelf, but may keep it for his own juſtification, in caſe he ſhould be queſtioned for what he had done; but only to return what he has done upon it. Lord *Raym.* 1196.

*112

Conſtable indemnified.

* 5. And this ſeems to be implied in the ſtatute of the 24 *G.* 2. *c.* 44. which enacteth, that no action ſhall be brought againſt any conſtable or other officer, or perſon acting by his order, and in his aid, for any thing done in obedience to the warrant of a juſtice of the peace, until demand hath been made, or left at the uſual place of his abode, by the party, or by his attorney, in writing, ſigned by the party demanding the ſame, of the peruſal and copy of ſuch warrant, and the ſame hath been refuſed or neglected for ſix days after ſuch demand: And if, after compliance therewith, any ſuch action ſhall be brought, without making the juſtice who ſigned the warrant defendant, on producing and proving ſuch warrant at the trial, the jury ſhall give their verdict for the defendant. *ſ.* 6. And it is certain the conſtable cannot grant a peruſal or copy of the warrant, unleſs he hath it in his cuſtody.

Fee for arreſt.

6. By an ancient ſtatute, 23 *H.* 6. *c.* 10. No ſheriff ſhall take for any arreſt, but 20d. and the bailiff which maketh the arreſt 4d. on pain of 40l; half to the king, and half to him that will ſue in ſeſſions (or the courts above) and treble damages to the party injured.

Upon which ſtatute perhaps may be founded the cuſtom in many places, of giving 4d. to the conſtable with the warrant, for his trouble in executing the ſame; which indeed at that time might be a reaſonable ſatisfaction; for 4d. then was worth more ten times the value of 4d. now. Which decreaſe in the value of money, in this and many other caſes depending upon ancient ſtatutes, may ſeem to require ſome conſideration.

The rewards for arreſting or apprehending highwaymen and others, may be found under their reſpective titles.

ASSAULT AND BATTERY.

I. Aſſault, what.
II. Battery, what.
III. In what caſes they may be juſtified.
IV. How puniſhed.

I. Aſſault, what.

ASSAULT, *aſſultus*, from the French *aſſayler*, is an attempt or offer, with force and violence, to do a corporal hurt to
*113 another; as by ſtriking at him with or * without a weapon; or preſenting a gun at him, at ſuch a diſtance to which the gun will carry;

carry; or pointing a pitchfork at him, ſtanding within the reach of it; or by holding up one's fiſt at him; or by any other ſuch like act, done in an angry, threatning manner. 1 *Haw.* 133.

And from hence it clearly follows, that one charged with an aſſault and battery, may be found guilty of the aſſault, and yet acquitted of the battery: But every battery includes an aſſault; therefore on an indictment of aſſault and battery, in which the aſſault is ill laid, if the defendant be found guilty of the battery it is ſufficient. 1 *Haw.* 134.

Notwithſtanding the many ancient opinions to the contrary, it ſeems agreed at this day, that no words whatſoever can amount to an aſſault. 1 *Haw.* 134.

II. Battery, what.

Battery (from the Saxon *batte*, a club, or *beatan*, to beat, from whence cometh alſo the word *battle*) ſeemeth to be, when any injury whatſoever, be it never ſo ſmall, is actually done to the perſon of a man, in an angry, or revengeful, or rude, or inſolent manner, as by ſpitting in his face, or any way touching him in anger, or violently juſtling him out of the way, and the like. 1 *Haw.* 134.

III. In what caſes they may be juſtified.

A man may juſtify an aſſault, in defence of his perſon, or of his wife, or maſter, or parent, or child within age; and even a *wounding* may be juſtified in defence of his perſon, but not of his poſſeſſions. 3 *Salk.* 46.

Alſo if an officer having a lawful warrant lay hands on another, to arreſt him, or if a parent in a reaſonable manner chaſtiſe a child, a maſter his apprentice, a ſchool-maſter his ſcholar; in all theſe caſes, and ſuch like, it is juſtifiable. 1 *Haw.* 130.

Likewiſe a perſon may juſtify an aſſault and battery of another, who doth menace or aſſault him, and attempt to beat him from his lawful watercourſe or highway. *Pult.* 42.

Likewiſe, if a perſon comes into my houſe, and will not go out, I may juſtify laying hold of him, and turning him out. 3 *Black.* 120.

And where a man in his own defence beats another who firſt aſſaults him, he may take advantage thereof, both upon an indictment, and upon an action; but with this * difference, that on an indictment he may give it in evidence upon the plea of not guilty, but on an action he muſt plead it ſpecially. 1 *Haw.* 134. *114

IV. How puniſhed.

There is no doubt but that the wrong-doer is ſubject both to an action at the ſuit of the party, wherein he ſhall render damages; and alſo to an indictment at the ſuit of the king, wherein he ſhall be fined according to the heinouſneſs of the offence. 1 *Haw.* 134.

But on an action of aſſault and battery, where the jury ſhall give leſs than 40s. damages, the plaintiff ſhall have no more coſts than damages, unleſs the judge ſhall certify on the back of the record, that an actual battery (and not an aſſault only) was proved upon the trial. 43 *El. c.* 6. 22 & 23 *C.* 2. *c.* 9. *ſ.* 136.

By 6 *G. c.* 23. *ſ.* 11. Aſſaulting in the ſtreet or highway, with intent to ſpoil people's cloaths, and ſo ſpoiling them is felony and tranſportation.

By 7 *G.* 2. *c.* 21. Aſſaulting with intent to rob, is alſo made felony and tranſportation.

And by 9 *Ann. c.* 16. Aſſaulting a privy councellor in the execution of his office, is felony without benefit of clergy.

A private aſſault is not inquirable in the leet, not being a common nuſance, as all affrays are. 1 *Haw.* 135.

Warrant for an aſſault.

Weſtmorland. { To the conſtable of ———

WHEREAS complaint hath been made before me J. P. *eſquire, one of his majeſty's juſtices of the peace in and for the ſaid county, upon the oath of* A. I. *of* ——— *in the ſaid county, taylor, that* A. O. *of* ——— *aforeſaid, butcher, did on the* ——— *day of* ——— *violently aſſault and beat him the ſaid* A. I. *at* ——— *aforeſaid, in the county aforeſaid: Theſe are therefore in his ſaid majeſty's name, to command you forthwith to apprehend the ſaid* A. O. *and to bring him before me to anſwer unto the ſaid complaint, and to be further dealt withal according to law. Given under my hand and ſeal the* ——— *day of*, &c.

*115

* Indictment for an aſſault.

THE jurors for our lord the king upon their oath preſent, that A. O. *of* ——— *in the ſaid county, butcher, on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— *at* ——— *aforeſaid, in the county aforeſaid, in and upon* A. I. *taylor, then and there being in the peace of God and of our ſaid lord the king, with force and arms, an aſſault did make, and him the ſaid* A. I. *then and there did beat, wound, and evil intreat, and then and there to him other enormous things did, to the great damage and hurt of him the ſaid* A. I. *to the evil example of all others offending in the like kind, and againſt the peace of our ſaid lord the king, his crown and dignity.*

ASSIZES.

1. ASSIZE (*assessio*) anciently signified in general, a court where the judges or assessors heard and determined causes; and more particularly upon writs of *Assize* brought before them, by such as were wrongfully put out of their possession. Which writs heretofore were very frequent; but now men's possessions are more easily recovered by ejectments, and the like. Yet still the judges in their circuits have a commission of *Assize*, directed to themselves and the clerk of assize, to take assizes, and to do right upon such writs. *Assize, what.*

2. To which commission of *assize*, four other commissions are now superadded; to wit, *The circuit commissions.*

(1) A commission of *general gaol delivery*, directed to the judges and the clerk of assize associate; which gives them power to try every prisoner in the gaol, committed for any offence whatsoever, but none but prisoners in the gaol.

(2) A commission of *oyer and terminer*, directed to the judges, and many other gentlemen of the county; by which they are impowered to *hear and determine* treasons, felonies, and other misdemeanors, by whomsoever committed, whether the persons to be tried be in gaol or not in gaol.

(3) A commission or writ of *nisi prius*, directed to the judges and clerk of assize, by which civil causes brought * to issue in the courts above, are tried in the vacation by a jury of twelve men of the county where the cause of action arises; and on return of the verdict of the jury to the court above, the judges there give judgment. *116

(4) A commission of the *peace* in every county of their circuit.

3. By the precept for the general gaol delivery abovementioned, the sheriff is commanded to attend there in person, with his under-sheriff; and to give notice to all justices of the peace, mayors, coroners, escheators, stewards, and also to all chief constables and bailiffs of hundreds and liberties, that they be then and there in their own persons with their rolls, records, indictments, and other remembrances, to do those things which to their offices in that behalf appertain to be done. *Sheriffs, justices, and others to attend there.*

By virtue whereof, all justices of the peace, mayors, and others abovementioned, of that county where the judges have their assizes, are bound to be present; and if they make default, without lawful impediment, the judges may set a fine upon them for their neglect. *Crown. Circ. Comp.* 4.

4. Also, by ancient custom (that is, by the common law of the land) before the coming of the judges, the high constables issue their warrants to the petty constables, to make presentments of all crimes and offences cognizable at the assizes; to the intent (as it seemeth) that the judges thereby may have a general information and knowledge, how the peace hath been kept: which presentments being delivered to the high constables, are by them delivered into court, and make up part of the rolls, and other remembrances abovementioned. *Constables presentment.*

Which

Which ſaid warrants of the high conſtables perhaps may be beſt drawn upon the words of the commiſſion of oyer and terminer, which is the largeſt of all the five commiſſions abovementioned: And then the form thereof may be thus:

Weſtmorland, East Ward. } To the conſtable of ——— in the ſaid county.

THESE are to require you the ſaid conſtable, in his majeſty's name, to make out a preſentment in writing of all treaſons, miſpriſions of treaſons, inſurrections, rebellions; counterfeitings, clippings, waſhings, falſe coinings, and other falſities of the money of Great Britain, *and of other kingdoms and dominions whatſoever; and of all the murders, felonies,* * *manſlaughters, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful uttering of words, aſſemblies, miſpriſions, confederacies, falſe allegations, treſpaſſes, riots, routs, retentions, eſcapes, contempts, falſities, negligences, concealments, maintenance, oppreſſions, champerty, deceits, and all other evil doings, offences and injuries whatſoever; and alſo the acceſſaries of them; by whomſoever, and in what manner ſoever, done, committed or perpetrated, within your conſtablewick. Which ſaid preſentment ſo made in writing as aforeſaid, and ſigned by you, you are to deliver to me at —— in the ſaid county, on —— the ——— day of ——— at the hour of ——— in the forenoon of the ſame day, that I may have the ſaid preſentment ready to be delivered to his ſaid majeſty's juſtices of oyer and terminer and general gaol delivery at the next aſſizes to be holden for the ſaid county. Herein fail you not, as you will anſwer the contrary at your peril. Given under my hand, the——— day of ——— in the year of our Lord ——.*

*1117

John Bowneſs, *High Conſtable.*

In what caſes the judges may act, tho' out of the proper county.

5. Whereas the courts of aſſiſe, niſi prius, oyer and terminer, and gaol delivery, for ſeveral counties at large, are often held in or near cities or towns that are counties of themſelves, and at the ſame time with the like courts for the ſaid cities or towns; and inconveniencies frequently ariſe in tranſacting the buſineſs of the ſeveral courts, for that the lodgings of the judges are ſituate either only in the county at large, or only in the county of ſuch city or town; it is therefore enacted, that whenever the ſaid courts for any county at large ſhall be held in or near any city or town which is alſo a county of itſelf, with the like or any of the like courts for the ſaid city or town, the lodgings of the judges ſhall be conſtrued and taken to be ſituate both within the county at large, and alſo within the county of ſuch city or town, for tranſacting the buſineſs of the aſſizes for ſuch county at large, and for the county of ſuch city or town during the time that ſuch judge or judges ſhall continue therein for the execution of their ſeveral commiſſions. 19 *G.* 3. *c.* 74. *ſ.* 70.

ATTACHMENT.

THIS word, as a law term, we have immediately from the French *attacher*, to tye, or make faſt. The Italian word is *attacare*; the Spaniſh *attacar*; and the Saxon *tæcan*, to take.

* It ſignifieth the taking of a man's body by commandment of a writ or precept; and is properly grantable in caſes of contempts, againſt which for the moſt part all courts of record generally, but more eſpecially thoſe of *Weſtminſter-hall*, and above all the court of king's bench may proceed in a ſummary manner, according to their diſcretion. 2 *Haw.* 141. *118

But in the caſe of *K.* and *Bartlett*, *H.* 8 *G.* 2. it is ſaid that generally the ſeſſions have not a power to award an attachment; but the court ſaid, they would not determine how it would have been, if they had committed the perſon for contempt: but the ordinary and proper method is, by indictment. 2 *Seſſ. Ca.* 176.

ATTAINDER.

THE difference between a man attainted and convicted is, that a man is ſaid to be convicted before he hath judgment, as if a man be convicted by verdict or confeſſion, and when he hath his judgment upon the verdict or confeſſion, then he is ſaid to be attainted. 1 *Inſt.* 390.

That is to ſay, his blood is become *(attinctus) tainted*, ſtained, or corrupted: inſomuch that by the common law, in caſes of treaſon or felony, his children or other kindred cannot inherit his eſtate, nor his wife claim her dower; and the ſame cannot be reſtored or ſaved, but by act of parliament; and therefore in divers inſtances, there is a ſpecial proviſion by act of parliament, that ſuch or ſuch an attainder ſhall not work corruption of blood, loſs of dower, nor diſheriſon of heirs.

ATTAINT.

ATTAINT is a writ that lieth, where a falſe verdict in a court of record, upon an iſſue joined by the parties, is given. 1 *Inſt.* 294. Which is treated of under title *JURORS.*

**ATTORNEY.* *119

1. AN *attorney* is one who is appointed to do any thing in the *turn*, ſtead, or place of another. 1 *Inſt.* 51. *Who.*

2. No attorney or ſolicitor ſhall be capable to continue or be a juſtice of the peace, during ſuch time as he ſhall continue in the buſineſs and practice of an attorney or ſolicitor.—But this not to extend to any *Juſtice of the peace not to act as attorney.*

city

city or town being a county of itſelf, nor to any city, town, or liberty, having juſtices of their own. 5 *G.* 2. *c.* 18.

Under-ſheriff. 3. No under-ſheriff, ſheriff's clerk, receiver, nor ſheriff's bailiff, ſhall be attorney in the king's courts, during the time that he is in office with any ſuch ſheriff. 1 *H.* 5. *c.* 4.

Steward of a franchiſe. 4. No ſteward, bailiff, nor miniſter of lords of franchiſes, which have return of writs, ſhall be attorney in any plea within the franchiſe or bailiwick, whereof he ſhall be officer. 4 *H.* 4. *c.* 19.

Recuſant. 5. No recuſant convict ſhall practiſe as an attorney or ſolicitor; on pain of 100l. half to the king, and half to him that ſhall ſue. 3 *J.* *c.* 5. *ſ.* 8.

Perſons convicted of barratry, or other crime. 6. If any perſon, who hath been convicted of forgery, perjury, or ſubornation of perjury, or common barratry, ſhall practiſe as an attorney or ſolicitor; he ſhall be tranſported for ſeven years. 12 *G.* *c.* 29. *ſ.* 4.

To be bound for 5 years. 7. No perſon ſhall act as attorney or ſolicitor, unleſs he ſhall have been bound for five years. 2 *G.* 2. *c.* 23. *ſ.* 5, 6.

Affidavit to be made thereof. 8. And every perſon bound to ſerve as clerk to any attorney or ſolicitor, ſhall within three months cauſe an affidavit to be made of the actual execution of the contract; in which affidavit ſhall be ſpecified, the name of the attorney and ſolicitor and of the perſon ſo bound, their places of abode, and the day of the date of ſuch contract: ſuch affidavit to be filed within the ſaid time, in the court where the attorney or ſolicitor is inrolled. 22 *G.* 2. *c.* 46. *ſ.* 3.

But there is generally an indemnifying clauſe in ſome act every two or three years, for relief of perſons who have omitted to cauſe ſuch affidavits to be made and filed, provided they cauſe the ſame to be done within a time therein limited.

And no perſon ſo bound ſhall be admitted or inrolled an attorney or
* 120 ſolicitor, before ſuch affidavit ſo filed ſhall * be produced and openly read in court. 22 *G.* 2. *c.* 46. *ſ.* 4.

Actual ſervice for the whole 5 years. 9. And ſuch clerk ſhall, during the whole time of ſervice ſpecified in the contract, continue and be actually employed by ſuch attorney or ſolicitor or his agent, in the proper buſineſs of an attorney or ſolicitor. 22 *G.* 2. *c.* 46. *ſ.* 8.

Provided, that if the maſter ſhall die or diſcontinue his practice, or if the contract ſhall by conſent be canceiled, or ſuch clerk be diſcharged by order of court; the clerk may be bound, during the reſidue of the term to another maſter: ſo as affidavit be made and filed as aforeſaid, of the execution of ſuch ſecond or other contract. *ſ.* 9.

And ſuch clerk, before he ſhall be admitted attorney or ſolicitor, ſhall cauſe an affidavit of himſelf, or of the attorney or ſolicitor to whom he was bound, to be made and filed as aforeſaid, that he hath actually and really ſerved and been employed by ſuch practiſing attorney or ſolicitor or his agent, during the ſaid whole term of five years. *ſ.* 10.

10. One

10. One of the judges in the courts of law, and the maſter of the rolls, or two maſters in chancery, and a judge of the other courts of equity reſpectively, ſhall examine any perſon touching his fitneſs and capacity to be an attorney or ſolicitor: and if approved of, he ſhall be ſworn in open court, and admitted and inrolled, without fee, except 1s. for adminiſtring the oath. Which admiſſion (on a quadruple 40s. ſtamp) ſhall be ſigned, and delivered to him. 2 *G.* 2. *c.* 23. *ſ.* 4, 5, 6. *Swearing and admiſſion.*

And the attorney's oath ſhall be this: "I A. B. do ſwear, that I "will truly and honeſtly demean myſelf in the practice of an attor- "ney, according to the beſt of my knowledge and ability; ſo help "me God." *ſ.* 13.

The ſolicitor's oath; "I A. B. do ſwear, that I will truly and "honeſtly demean myſelf in the practice of a ſolicitor, according to "the beſt of my knowledge and ability; ſo help me God." *ſ.* 14.

11. If any perſon ſhall act as attorney or ſolicitor, for or in expectation of any gain or reward, without being admitted and inrolled as aforeſaid: he ſhall forfeit 50l. and be incapable to act for the future: The ſaid penalty to be recovered in any of the courts of record at *Weſtminſter*, or in the counties palatine reſpectively, or great ſeſſions in Wales, or at the aſſizes or ſeſſions, by any perſon who ſhall ſue for the ſame within 12 months, together * with treble * 121
coſts; and no proceedings thereupon ſhall be removed before judgment, or ſtayed by any certiorari or other writ. 2 *G.* 2. *c.* 23. *ſ.* 24. 25. *Penalty of acting before inrolled.*

And by the 7 & 8 *W. c.* 24. Any attorney or ſolicitor, acting as ſuch, before he hath taken the oaths and ſubſcribed the declaration, as other perſons qualifying for offices, ſhall incur a præmunire.

12. And every attorney or ſolicitor practiſing in any court holding pleas for 40s. or upwards, ſhall take out a certificate of his admiſſion, inrolment, or regiſter, for which he ſhall pay a ſtamp duty, if within the bills of mortality of 5l. elſewhere 3l. the ſame to be renewed annually ten days at leaſt before the end of the year, on pain of forfeiting 50l. to be recovered in the courts at *Weſtminſter*, 25 *G.* 3. *c.* 80. *ſ.* 1, 7. *Licence.*

The ſaid duties to be under the management of the commiſſioners of the ſtamp duties. *ſ.* 2.

13. No attorney or ſolicitor ſhall have more than two clerks at any one time. 2 *G.* 2. *c.* 23. *ſ.* 15. *To have no more than two clerks.*

Except the prothonotaries in the common pleas, and the ſecondary in the king's bench, and the ſeveral prothonatories in the counties palatine, and great ſeſſions in Wales; each of whom may have three, who ſhall be bound and ſerve for ſuch time as aforeſaid, and examined, admitted, and inrolled, as other perſons who have ſerved to a ſworn attorney. *ſ.* 16.

14. A ſworn attorney may, on examination as aforeſaid, be admitted, ſworn, and inrolled a ſolicitor, in any of the courts of equity, without fee or ſtamp. 2 *G.* 2 *c.* 23. *ſ.* 20. *Attorney may be admitted a ſolicitor.*

Solicitor may be admitted an attorney.

15. In like manner, a ſworn ſolicitor may be admitted, ſworn, and inrolled an attorney in the king's bench or common pleas. 23 G. 2. c. 26. ſ. 15.

May be admitted in other courts.

16. So alſo, a ſworn ſolicitor in any of the courts of equity may, on examination as aforeſaid, be admitted, ſworn, and inrolled, in any other court of equity, without fee or ſtamp. 2 G. 2. c. 23. ſ. 21.

May act in the name of any other attorney.

17. And any attorney or ſolicitor in any of the courts reſpectively, may, with the conſent in writing of an attorney in any other court, in the name of ſuch attorney, ſue out any proceſs, and carry on any ſuit, in ſuch court; notwithſtanding he is not ſworn and admitted to be an attorney of ſuch court. 2 G. 2. c. 23. ſ. 10.

May act in inferior courts of record.

18. And any perſon, who hath been admitted an attorney in any of his majeſty's courts of record at Weſtminſter, ſhall be capable of being admitted to practiſe as an attorney in any inferior court of record; provided he * be in all other reſpects qualified according to the cuſtom of ſuch inferior court. 6 G. 2. c. 27.

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Perſons unqualified not to act in the ſeſſions.

19. No perſon ſhall act as attorney, ſolicitor, or agent at any general or quarter ſeſſions of the peace, without being duly inrolled; on pain of 50l. to him who ſhall ſue in twelve months, with treble coſts; and if any attorney or ſolicitor ſhall permit him to make uſe of his name in ſuch ſeſſions, he ſhall forfeit 50l. in like manner. 22 G. 2. c. 46. ſ. 12.

And no clerk of the peace or his deputy, or any under-ſheriff or his deputy, ſhall act as ſolicitor, attorney, or agent, at any general or quarter ſeſſions of the peace of the county or place where he ſhall execute his ſaid office reſpectively, on pain of 50l. in like manner. ſ. 14.

Nor in the county court.

20. A perſon acting as attorney or ſolicitor in the county court, without having been legally admitted; ſhall forfeit 20l. with coſts, to him who ſhall ſue in 12 months in any of his majeſty's courts of record. 12 G. 2. c. 13. ſ. 7.

Privilege.

21. An attorney, in reſpect of his attendance at the court, cannot be preſſed for a ſoldier. *Comyn's Dig.* Attorney.—But he is not privileged from ſerving in the militia, or finding a ſubſtitute in his ſtead. *Blackſtone's Rep.* 1123.

An attorney ſhall not be made conſtable, though there be a cuſtom that every inhabitant ſhall be choſen in his turn. *Comyn's ib.*

And, in general, it is ſaid, that he ſhall not be elected into any other office, againſt his will; as to the office of overſeer of the poor, or churchwarden, or any office within a borough. *id.*

So he ſhall not be choſen collector of the lord's rent within a manor, where it is copyhold; though it be part of his tenure. *id.*

So

So he ſhall not be amerced for not doing his ſuit at the lord's court, when his attendance at Weſtminſter is required. *id.*

In the caſe of the corporation of *Norwich* v. *Berry* T. 7. G. 3. it was determined, that an attorney ought to have his privilege allowed from executing the office of ſheriff. It was obſerved, that the conteſt was not between the city of *Norwich* and the attorney, but between the city of *Norwich* and the court of common pleas; that the privilege of the court was the matter in queſtion, which has exiſted as long as the court; and the crown could not, by a charter granted to a corporation, take it away. *Burr. Manſf.* 2109.

* If an attorney be denied his privilege, he may have a writ of privilege for his diſcharge. 2 *Haw.* 63. *123

22. If any attorney be notoriouſly found in any default, of record, or otherwiſe; he ſhall forſwear the court, and never after be received to make any ſuit in any court of the king. 4 *H.* 4. *c.* 18. *Miſbehaviour.*

And therefore, where an attorney ſued out a *capias*, without an original; he was ſtruck out of the roll, and ſworn, that he be not an attorney in any of the king's courts. *Comyn's Dig.* Attorney.

So an attorney, who gave names to the ſheriff to be returned upon a jury, was caſt over the bar. *id.*

So if he takes money of his client, and afterwards wholly refuſes to intermeddle with his buſineſs; he ſhall be ſtruck out of the roll. *id.*

If he refuſes a re-delivery of writings intruſted to his peruſal, though ſome of them concern himſelf principally; the court, upon motion, will compel him to re-deliver them, on payment of all due to him in the cauſe for which they were delivered; for if the writings were delivered for a ſpecial purpoſe, he ſhall not detain them for another demand. *id.*

And the court will award an attachment againſt him, for bad and fraudulent practice; and he ſhall pay coſts thereupon, or ſhall be committed: But an attachment will not be granted before a day allowed to ſhew cauſe. *id.*

23. No attorney or ſolicitor, being a priſoner, ſhall, in his own name, or in the name of any other attorney, during his confinement, ſue out any writ or proceſs, or commence any action; on pain that ſuch proceedings ſhall be void, and he ſhall be incapacitated to act as attorney or ſolicitor for the future; and any attorney or ſolicitor permitting or impowering him to do ſo in his name, ſhall be in like manner incapacitated. 12 *G.* 2. *c.* 13. *ſ.* 9. *Acting when under confinement.*

Provided, that ſuch perſon ſo confined may carry on or tranſact any ſuit commenced before his confinement. *ſ.* 10.

24. Every writ or proceſs for arreſting the body, and every writ of execution, or ſome label annexed to ſuch writ or proceſs, and every warrant to be made out thereupon, ſhall be ſubſcribed or indorſed with the name of the attorney, clerk in court, or ſolicitor; and where ſuch perſon ſhall not be immediately employed by the plaintiff, then alſo with the name of the attorney or ſolicitor immediately *Name to be inſcribed on writs or other proceſs.*

*124 immediately employed: And every copy of any writ to be ſerved on the defendant ſhall be ſubſcribed or indorſed, * with the name of the attorney or ſolicitor immediately employed. 2 G. 2. c. 23. ſ. 22.

But the not ſubſcribing or indorſing the name of the attorney, clerk in court, or ſolicitor, on the warrant made out on the proceſs, ſhall not vitiate the ſame; provided the writ be ſubſcribed or indorſed: but the ſheriff making out ſuch warrant, and not ſubſcribing or indorſing the name of the attorney, clerk in court, or ſolicitor, who ſued out the ſame, ſhall forfeit 5l. to be aſſeſſed upon him as a fine, by the court out of which the proceſs iſſued, half to the king, and half to the party aggrieved by ſuch omiſſion. 12 G. 2. c. 13. ſ. 4.

Acting for a perſon unqualified.

25. If any ſworn attorney or ſolicitor ſhall knowingly act as agent for any perſon not qualified; he ſhall, on proof thereof to the court in a ſummary way, be ſtruck off the roll and incapacitated; and ſuch unqualified perſon ſhall be committed to the priſon of the court, for any time not exceeding one year. 22 G. 2. c. 46. ſ. 11.

Suffering a perſon unqualified to act in his name.

26. If any ſworn attorney ſhall knowingly ſuffer any perſon not being a ſworn attorney or ſolicitor, to act in his name; he ſhall be incapable to act as an attorney. 2 G. 2. c. 23. ſ. 17.

Suffering wilful delay.

27. If any attorney or ſolicitor ſhall willingly delay his client's ſuit, to work his own gain; the party grieved ſhall have his action for the ſame, and recover coſts and treble damages; and the ſaid attorney or ſolicitor ſhall be diſcharged from being an attorney or ſolicitor any more. 3 ſ. c. 7.

In the caſe of *Ruſſel* and *Stewart*, *M.* 6 G. 3. The defendant being a priſoner, the plaintiff's attorney had neglected to charge him in cuſtody within the time limited for his diſcharge upon common bail; whereupon the plaintiff brought an action againſt the attorney, and recovered againſt him 150l. damages. *Burr. Manſf.* 1788.

To deliver a bill ſigned.

28. All attornies and ſolicitors ſhall give a true bill unto their clients ſubſcribed with their own hands and names, before they ſhall charge their clients with their fees or charges. 3 ſ. c. 7.

Penalty for a wrong charge.

29. And if any attorney or ſolicitor ſhall demand by his bill any other ſum of money, or allowance upon his account of any money, which he hath not laid out; the party grieved ſhall have his action for the ſame, and recover coſts and treble damages; and ſuch attorney or ſolicitor ſhall be diſcharged and incapacitated. 3 ſ. c. 7.

Client to have a month to pay in.

30. No attorney or ſolicitor ſhall ſue for recovery of his fees, until after one month from the time of delivering the bill ſigned. 2 G. 2. c. 23. ſ. 23.

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Taxation.

* 31. And the client, on ſubmiſſion to pay the whole ſum that on taxation ſhall appear due, may have the bill taxed by the proper officer. And if the attorney or ſolicitor, or the party charged, having due notice, ſhall not attend the taxation; the officer may proceed to tax the bill *ex parte*: (And

no

no ſuit ſhall be commenced for the ſaid fees during the taxation.) And on taxation and ſettlement of the bill, the party ſhall forthwith pay to the ſaid attorney or ſolicitor, or to any perſon by him authorized who ſhall be preſent at the taxation, or otherwiſe as the court ſhall direct, the whole ſum that ſhall be found due; and in default thereof, the party ſhall be liable to an attachment, or to ſuch proceedings at the election of the attorney or ſolicitor as the party ſhall be otherwiſe liable to by law. And if it appear on the taxation, that the attorney or ſolicitor hath been overpaid; he ſhall forthwith refund, on pain of attachment, or ſuch other proceedings as aforeſaid. If the bill taxed be leſs by a ſixth part than the bill delivered; the attorney or ſolicitor ſhall pay the coſts of taxation: But if it ſhall not be leſs, the court ſhall charge the attorney or client according to their diſcretion. 2 *G.* 2. *c.* 23. *ſ.* 23.

Provided, that the ſaid act ſhall not extend to any bill of fees due from any attorney or ſolicitor, to any other attorney or ſolicitor or clerk in court; but they may uſe ſuch remedies for the recovery thereof, as they might have done before the making of the ſaid act. 12 *G.* 2. *c.* 13. *ſ.* 6.

32. In ſome caſes the attorney himſelf ſhall be liable to pay coſts. As in the caſe of the *King* and *Fielding*, *M.* 32, *G.* 2. On ſhewing cauſe why an information ſhould not be granted againſt Mr. *Fielding*, for a miſdemeanour in his office of a juſtice of the peace; the complaint appeared to be frivolous and vexatious: ſo that the juſtice ought to have the coſts he had been put to in defending himſelf againſt it. The only queſtion was, who ſhould pay them.—The complaint was made on a joint affidavit made by the proſecutor (one *Taylor*), and his attorney (Mr. *Callaghan.*) Which attorney (as was proved on oath) had alſo declared, that if it ſhould coſt him 100l. he would lay *Fielding* by the heels.—It was ſtrongly urged on the behalf of Mr. *Callaghan*, that it would be a very great diſcouragement to attornies, in the courſe of their practice, if they were to be made perſonally liable to coſts, in caſe their clients motions ſhould not ſucceed; which motions they had engaged in, at the application of their clients, and upon facts repreſented to them by their clients, as * being true and candidly ſtated: and which they themſelves could not know or ſuſpect to be otherwiſe; and that it would be ſtill more hard upon them, to do this without hearing what they could urge in their own defence. —But the court were clear and unanimous, that in this caſe, they might and ought to do it; becauſe Mr. *Callaghan* not only appeared as proſecutor, by joining in the original affidavit of complaint; but had alſo expreſly declared, that if it ſhould coſt him 100l. he would lay Fielding by the heels. Therefore they diſcharged the rule with coſts, to be paid by Mr. *Taylor* and Mr. *Callaghan*. Burrow, Mansfield 654.

In what caſe the attorney himſelf ſhall pay coſts.

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Auction, duty on. See *EXCISE*.

A W A R D.

IT is judged not foreign to the office of a keeper of the peace, to have ſome knowledge of the law contained under this title: Concerning which we will ſhew,

I. What things may be ſubmitted to arbitration.
II. The ſeveral kinds of ſubmiſſion to arbitration.
III. The award; and therein what ſhall be deemed a good award, and what not.

I. What things may be ſubmitted to arbitration.

Actions perſonal. 1. It is held clearly, that all matters of controverſy, either of fact or of a right in things and actions perſonal and uncertain, may be ſubmitted to arbitration. 9 *Co.* 78.

Matters of freehold. 2. Matters of freehold, or any right and title to a freehold, cannot be ſubmitted to arbitrament; for a freehold is not transferrable from one to another, without livery and ſeiſin: Yet if there be a ſubmiſſion concerning the right, title, or poſſeſſion of lands and tenements, and the parties enter into mutual bonds, to ſtand to the award made relating to them, they forfeit their bonds unleſs they obey it. 1 *Roll. Abr.* 242, 244. *Read.* Arb. *Wood, b.* 4. *c.* 3.

So if the condition of an obligation is, to ſtand to an award touching lands; and the arbitrator awards the land to one, and that the other ſhall releaſe to him: if he doth not releaſe, the obligation is forfeited. 1 *Bac. Abr.* Arbitrament.

*127 * But if the arbitrator awards the land to one, it ſeems the obligation is not forfeited, tho' the other do not convey to him to make him a good title; for the arbitrator hath not awarded any act to be done by the party, and the award itſelf cannot transfer the right, and ſo muſt be void, and then the condition of the obligation cannot be forfeited: for the awarding the land to one, cannot be expounded, that the other ſhall infeoff him. *id.*

And altho' there be no bond, yet if the arbitrator do award that the one ſhall infeoff the other; it ſeems that an action on the caſe may be maintained for not doing it: for the award in itſelf is as good as if there were a bond, and then there is the ſame reaſon an action ſhould lie, as that the condition of the obligation ſhould be forfeited; for if ſuch an award were void, then the condition of the obligation to perform it could not be broken. *id.*

In like manner, an *annuity* is not determinable by award; for it is reckoned in nature of a freehold, and therefore cannot paſs without the deed of the party. *id.*

So a *partition* cannot be made by award; for a freehold cannot paſs (as was ſaid) without livery and ſeiſin. *id.*

It hath been doubted, whether leaſes for years, being *chattels real*, could be transferred by award; therefore it ſeems ſafeſt, when the controverſy relates to theſe, that the parties be bound in mutual obligations to perform the award; and then, if the arbitrators award, that one ſhall aſſign

aſſign or transfer the leaſe to the other; if he refuſeth, he forfeits his obligation. *id.*

3. Debts on arrearages of accounts before auditors, ſhall not be diſcharged by award; becauſe it appears of record, and muſt be diſcharged by matters of as high a nature. 1 *Bac. Abr.* Arbitrament. *Matters of record.*

4. Debts due by ſpecialty cannot be diſcharged by a bare award; but if the ſubmiſſion was by bond, the award would be a good bar; for one ſpecialty may be diſſolved by another. 1 *Bac. Abr.* Arbitrament. *Debts due by ſpecialty.*

5. A certain and fixed debt is not diſcharged by an award; for the end and deſign of an arbitration is, to reduce uncertain debts and duties to a certainty: and to award a man a certain debt, is to give him no more, nor do any greater thing for him, than was done before; for now he can have but an action, and that he might have before; and to give him leſs than he had before, is to do him a manifeſt injuſtice, which the arbitrator cannot do. 1 *Bac. Abr.* Arbitrament. *A thing certain.*

But if 20l. be due to a man, and he and another ſubmit all perſonal things to arbitration; there, if the arbitrator * award 10l. it is a good award: becauſe there were other uncertain things ſubmitted, and the arbitrator had conſideration of all, and ſet one againſt the other in making the award; ſo as perhaps the debt of 20l. was diminiſhed, in conſideration of ſome treſpaſſes done by him to the other party. *id.* *128

6. Criminal matters, as treaſons, murders, felonies, and other offences indictable at the ſuit of the king, cannot be ſubmitted to arbitrament; for it is for the good of the commonwealth, that ſuch offenders be made known and puniſhed: and the king in ſuch caſes is a party, for whom the other parties cannot undertake. And altho' the ſubmiſſion be by bond, yet the obligation is void; and the parties may be puniſhed for entring into ſuch bonds. 1 *Bac. Abr.* Arbitrament. *Criminal offences.*

But if the party injured proceeds by way of action, as he may in aſſaults and batteries, libels, and the like; the damages he ſuſtained or expects to recover, may be ſubmitted to arbitration: for in ſuch caſe the action is for himſelf, and not for the king. *Compleat Arbitrator.* 28.

7. Alſo matrimonial cauſes, or any thing concerning the contract or diſſolution of marriage, cannot be ſubmitted to arbitrament. 1 *Roll's Abr.* 252. *Matrimonial cauſes.*

But the damages a perſon ſuſtained by a promiſe of marriage, or any thing relating to a marriage portion, may be ſubmitted. 16 *Ed.* 4. 2.

II. The ſeveral kinds of ſubmiſſion to arbitration.

1. A ſubmiſſion by *words* is good, and the party in whoſe favour the award is made, hath a remedy to enforce a performance of it: Yet it is not expedient that any ſubmiſſion ſhould be by parol, becauſe the party may revoke it at pleaſure, at any time before the award made, and that by word likewiſe; and the judges will rarely enforce the performance of an award, when either the ſubmiſſion *By parol.*

miſſion or the award is by parol, becauſe it lays ſo great a foundation for perjury. *Compl. Arb.* 21.

By covenant. 2. Submiſſion may alſo be by *covenant*; but this method is ſeldom uſed: for tho' it contains the ſame certainty with a bond, yet the method of ſuing on a covenant is different, and more difficult than in ſuing on a bond. *Compl. Arb.* 7, 46.

By rule of court. 3. Submiſſion by *rule of court* (A) is made in purſuance of the ſtatute 9 & 10 *W. c.* 15. which enacteth as follows:

*129 * It ſhall be lawful for all merchants and traders, and others deſiring to end any controverſy, ſuit, or quarrel (for which there is no other remedy but by perſonal action, or ſuit in equity) by arbitration, to agree that their ſubmiſſion to the award or umpirage be made a rule of any of his majeſty's courts of record, which the parties ſhall chooſe, and to inſert ſuch agreement in their ſubmiſſion, or the condition of the bond or promiſe, whereby they ſubmit themſelves: Which agreement being ſo made and inſerted in their ſubmiſſion or promiſe, or condition of their reſpective bonds, ſhall or may, on producing an affidavit thereof, made by the witneſſes thereunto, or any one of them, in the court of which the ſame is agreed to be made a rule, and reading and filing the ſaid affidavit in court, be entred of record in ſuch court: and a rule ſhall thereupon be made by the ſaid court, that the parties ſhall ſubmit to, and finally be concluded by ſuch arbitration or umpirage; and in caſe of diſobedience to ſuch arbitration or umpirage, the party neglecting or refuſing to perform the ſame, or any part thereof, ſhall be ſubject to all the penalties of contemning a rule of court; and the court on motion ſhall iſſue proceſs accordingly; which proceſs ſhall not be ſtopped or delayed in its execution, by any order of any other court of law or equity, unleſs it ſhall be made appear on oath to ſuch court, that the arbitrators or umpire miſbehaved themſelves, and that ſuch award was procured by corruption, or other undue means.

And this is allowed to be the moſt expeditious way; and the method is to get a counſel to move in any of the courts to have it made a rule, which in ſuch caſe is never denied: and then the party is liable to the ſame penalties that he would be for diſobeying any other rule of court. *Compl. Arb.* 6, 47.

By bond. 4. Or laſtly, the ſubmiſſion may be by bond (B). In which caſe each party muſt give to the other a bond; which bond, and condition, muſt contain exactly the ſame words, only changing the names of the parties. And the penalty of the bond ſhould at leaſt be the value of the thing ſubmitted; ſo that the party may rather abide by the award, than forfeit his obligation. *Compl. Arb.* 46.

And undoubtedly a ſubmiſſion by bond in ſome reſpects, exceeds a ſubmiſſion by rule of court: for an award made purſuant to bonds of ſubmiſſion, may bind the parties executors; but if the party who refuſes to perform an award made purſuant to a rule of court, ſhall die, the act of parliament directing, that the proſecution ſhall be carried

carried on * by attachment, the remedy being loſt, the award is loſt likewiſe. *Compl. Arb.* 34. *130

5. Sometimes the ſubmiſſion is both by bond and rule of court, by adding the parties conſent at the bottom of the condition of the bond; and this is ſtill the beſt way, for then the party may proceed which way he pleaſes: and it is ſaid, that he may proceed both ways; that is to ſay, both on the bond, and have an attachment likewiſe for the contempt. 1 *Salk.* 73. *Both by bond and rule of court.*

6. It hath been uſual alſo of late years, to inſert in the ſubmiſſion a clauſe that no bill in equity ſhall be filed againſt the arbitrators: which reſtriction will be a bar againſt ſuch bill being brought. As in the caſe of *Lingood* and *Croucher*, *Aug.* 6, 1742; One condition of the ſubmiſſion was, that the parties ſhould be reſtrained from preferring a bill in equity againſt the arbitrators. And on a bill being brought, the ſubmiſſion was pleaded in bar. And by the lord chancellor *Hardwicke*: the plea muſt be allowed. And he mentioned a caſe of one Mr. *Robins* in lord chancellor *King*'s time, who being appointed arbitrator by the court, accepted of it with a proviſo that the parties would enter into a rule not to bring a bill in equity, which was done accordingly: notwithſtanding which, the party againſt whom the award was made brought a bill againſt the arbitrator, and charged corruption and partiality. Upon which Mr. *Robins* moved, that he might be ſtruck out from being a party to the cauſe. His lordſhip granted the motion, and ſaid it would be a very great hardſhip upon arbitrators if they ſhould be harraſſed with ſuits, and the allowing them to be liable to ſuch ſuits would effectually diſcourage perſons of worth from accepting the office of arbitrators. And therefore he ſtruck him out from being a party. 2 *Atkyns*, 395. *Reſtriction againſt filing a bill in equity.*

7. But in which way ſoever the ſubmiſſion is made, the ſame nevertheleſs may be revoked, tho' made irrevocable by the ſtrongeſt words; for a man cannot by his own act, make ſuch authority or power not countermandable, which by the law and in its own nature is countermandable. 8 *Co.* 82. *Whether the ſubmiſſion may be countermanded.*

But if the ſubmiſſion be by bond, if the party revokes, he forfeits his obligation, for that he hath broken the words of the condition, which are, that he ſhall ſtand to and abide the award. And if he revokes he muſt likewiſe give notice of the revocation; and if the ſubmiſſion was by bond, the revocation muſt be in writing. 8 *Co.* 82.

* And if the ſubmiſſion be made a rule of court, purſuant to the act of parliament; if either of the parties revokes, the court will grant an attachment. *Compl. Arb.* 82. *131

But if the ſubmiſſion be by word, the party may revoke at pleaſure, and he forfeits nothing; but he muſt in this caſe likewiſe give notice of the revocation, tho' it need not be in writing: and the notice muſt be to the arbitrators themſelves. 8 *Co.* 82.

III. The award (C); *and therein what ſhall be deemed a good award, and what not.*

Arbitrators cannot adminiſter an oath.

1. The arbitrators cannot injoin an oath to the witneſſes, there being no law which gives them any ſuch power.

Award beſt to be in writing.

2. It is highly convenient that the award be in writing, and ſo to be mentioned in the ſubmiſſion. *Compl. Arb.* 34.

And upon Stamp.

3. By the 23 *G.* 3. *c.* 58. Every award in writing ſhall be on a 5s. ſtamp.

Award to be according to the ſubmiſſion.

4. One thing eſſential to a good award is, that it be made with reſpect to perſons and things, according to the ſubmiſſion. *Wood. b.* 4. *c.* 3.

Upon which ground, as the arbitrators are, with reſpect to the things ſubmitted, circumſcribed and tied down to the ſubmiſſion; ſo in ſeveral caſes it has been diſputed, whether their awarding releaſes to the time of the award, and not to the time of the ſubmiſſion, was good; it is therefore moſt adviſeable to award releaſes to the time of the ſubmiſſion; tho' it is now clearly held, that general releaſes ſhall extend only to the time of the ſubmiſſion, and that if there be releaſes awarded to the time of the award, they ſhall be good, unleſs it be ſhewn on the other ſide, that ſome new matter hath ariſen between the parties between the ſubmiſſion and award. 1 *Roll. Abr.* 242. 6 *Mod.* 34.

That is to ſay, an award of releaſes to the time of making the award, includes all that is within the ſubmiſſion, and more; which ſhall be good for ſo much as is within the ſubmiſſion, and void for the reſidue. 1 *Bac. Abr.* Arbitrament.

If the ſubmiſſion be of *all matters in difference*, the arbitrators, in diſputes between two partners, may diſſolve the *partnerſhip*. As in the caſe of *Green* and *Waring*, *T.* 4. *G.* 3. It was moved to ſet aſide an award between two partners, becauſe the arbitrator, amongſt
*132 other * particulars, had directed the partnerſhip to be diſſolved; which, it was argued, was exceeding his power. But by the court; when all matters in difference were referred, he had clearly a power to diſſolve it. If a difference between a maſter and apprentice were referred, the arbitrators would have a power to order the indentures to be delivered up. And although it was ſworn, that at the trial of this cauſe, when the rule of reference was drawn up generally in the uſual form, referring *all matters in difference*, the plaintiff openly declared, that he would not have it underſtood that the arbitrator had a power to diſſolve the partnerſhip, lord *Mansfield* obſerved, that this is ſufficient evidence, from the party's own mouth, that the diſſolution of the partnerſhip was then a *matter in difference*. And the rule for ſetting aſide the award was diſcharged. *Blackſtone's Reports*. 475.

If the ſubmiſſion be, *ſo as the award be ready to be delivered to the parties or to ſuch of them as ſhall deſire the ſame*, the parties ſo bound are themſelves obliged to take notice of the award at their

their peril; but if the words of the ſubmiſſion be, *ſo that the award be delivered to each party by ſuch a day*, then it muſt be delivered to each party accordingly. *Read.* Arb. *Wood. b.* 4. *c.* 3.

But tho' the words of the ſubmiſſion may be ſuch, as will oblige the parties to take notice of the award at their peril; yet if the arbitrators award that one of the parties ſhall do an act, which depends upon another firſt to be done of the other party, he muſt have notice of it; at leaſt the party who would take advantage of it, muſt ſhew that he hath done what was neceſſary on his part. *Compl. Arb.* 12.

An award that one ſhall pay for the writings of the award, or the reckoning in the houſe where the award was made, is a void award; for ſuch things are plainly out of the ſubmiſſion. 1 *Roll. Abr.* 254.

Award to be beneficial to either party.

5. Alſo, it is required, that the award be beneficial, and appoint ſomething advantageous to either party; for an award of one ſide only, is not good: ſo if an award be that one of the parties ſhall go to *Rome*, when it appears that there is no advantage to the other party by his going, it is void. *Wood. b.* 4. *c.* 3.

So if a man and woman ſubmit themſelves to an award, it is no good award that they ſhall *intermarry*, for this is not intended any advantage. 1 *Roll. Abr.* 252. And the bodies of the parties are not ſubmitted to arbitration. 1 *Bac.. Abr.* Arbitrament.

* Where an award was, that the defendant ſhould pay to the plaintiff two ſums at ſeveral times, and that ſeveral releaſes ſhould be given preſently; it was objected, that by giving ſuch releaſes the bond and money would be diſcharged, and therefore the awarding the releaſe was void againſt the plaintiff, and ſo there is nothing of his ſide to be done: And of this opinion was the court. But where the award was, that money ſhould be paid at two ſeveral days, and releaſes given, ſo that it appears by the very method and order of the award, that the general releaſes were not to be given till after the money paid; the court were clear of opinion, that it was well enough, and ſo judgment was given for the plaintiff. 2 *Mod.* 169. *133

Award to be poſſible and lawful.

6. Alſo it is required in a good award, that it be poſſible and lawful. *Wood. b.* 4. *c.* 3.

Thus, if an award be, that one of the parties ſhall kill, ſteal, forge a deed, or the like, it is void. 1 *Inſt.* 206.

In like manner, if it be awarded, that money ſhall be paid to an infant, and that he ſhall make a releaſe, it is void; for the infant's releaſe is not good in law.

Alſo it is held, that where a thing is awarded to be done, which afterwards becomes impoſſible by the act of God, the party is excuſed; as if an award be, to deliver a horſe before ſuch a day, and he dies before that day. 21 *Ed.* 4. 70.

Award to be certain and final.

7. Alſo it is required, that the award be certain and final. *Wood. b.* 4. *c.* 3.

Upon which ground it hath been reſolved, that if the arbitrators award, that one of the parties beg the other's pardon before ſuch a mayor, or ſuch and ſuch perſons, it is good and certain enough; but if the award be, that he ſhall beg pardon in ſuch manner and in ſuch place as the other party ſhall appoint, it is not good; for the arbitrators

are to determine, and not to make such party his own judge in his own cause. And tho' the time and place be but circumstances, yet in this sort of satisfaction they make the most considerable part. 1 *Salk.* 71.

Upon which ground also, the arbitrators cannot regularly reserve any thing for their future judgment, when the time allowed them is expired; for then such their award is not certain and final. *Cro. Jac.* 585.

An award that the defendant shall *give security* to the plaintiff, for payment of a sum of money, is void for the uncertainty; not shewing what security he should give, whether by bond or otherwise. *Cro. Jac.* 314.

In the case of *Winter* and *Garlick*, T. 3 *An.* it was awarded that the defendant should pay to the plaintiff 10l. and all the *costs* of a suit then depending in an inferior * court, and afterwards to give mutual releases. By the court: An award to pay such costs as the master shall tax is good, because it may be reduced to a certainty; but this is uncertain, and carries it farther than has hitherto been allowed. And *Holt* chief justice said, that it hath been held a good award, to pay such costs as the prothonatory shall tax, and that carries it far enough; but that surely the arbitrators should either ascertain it themselves, or refer it to a proper officer. 1 *Salk.* 75. 6 *Mod.* 195.

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But in the case of *Dudley* and *Nettleford*, *H.* 13 *G.* where it was awarded, that the plaintiff should pay the costs, and nobody was appointed to tax them, the court supplied it by ordering the master to do it. *Str.* 737.

And in the case of *Hawkins* v. *Colclough*, *E.* 30 *G.* 2. Lord *Mansfield* said, that awards are now considered with greater latitude and less strictness than they were formerly; and it is right that they should be so, because they are made by judges of the parties own chusing. And this was in the case of an award made by a cobler, upon a submission of all disputes; which award was in these words: "Whereas there has been a suit at law between the parties, that has run to a great expence on both sides; and it being left to me to make an end of it: I determine that they shall each of them pay their own charges at law; and that the defendant pay the plaintiff 5s. for his making the first breach in the law." And the award was held to be sufficiently certain and final. *Burrow*, Mansfield. 274.

And in the case of *Lucas* and *Wilson*, *M.* 32 *G.* 2. Lord *Mansfield* said, the court will not enter at all into the merits of the matter referred to arbitration, but only take into consideration such legal objections as appear upon the face of the award, and such objections as go to the misbehaviour of the arbitrators. *Burrow*, Mansfield. 701.

And in the case of *Tittenson* and *Peat*, in the chancery, *July* 1, 1747, lord *Hardwicke* said, the only ground to impeach an award is collusion, or gross misbehaviour in the arbitrators; for otherwise, it is final and binding upon all parties, or else no persons would ever undertake to be arbitrators. And a plea of an award is good, not only to the merits of the case but also to a discovery; for a defendant to the bill is not obliged to set out the whole account between him and the plaintiff after an award in his favour, for that it is conclusive to all the parties, till an error is shewn in taking the account, or partiality and improper behaviour in the arbitrators.——And in another * case, *July* 30, 1728, a bill

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a bill was brought to ſet aſide an award, and the arbitrator was made a party, and the bill ſought a diſcovery from him of the grounds on which he made his award, and to ſet it forth minutely in his anſwer. But by lord *Hardwicke*, unleſs there is corruption or partiality in an arbitrator, the party cannot ſet aſide his award; and if it ſhould be allowed to make arbitrators defendants, and give them all this trouble to ſet forth the particular reaſons upon which they founded their award, it would introduce very great inconvenience, and be a diſcouragement to any perſon to undertake a reference: If there was a palpable miſtake made by an arbitrator, or miſcalculation in an account that had been laid before him, the party aggrieved might bring his bill againſt the party in whoſe favour the award was made, to have it rectified, and not againſt the arbitrator. And his lordſhip ſaid, he did not know whether there was any eſtabliſhed rule of the court with regard to arbitrators ſetting forth the reaſons of their award, and how far they were obliged to diſcover, and how far not; but if there was none, he ſhould not ſcruple to make one, becauſe it would be unreaſonable to put an arbitrator to ſo much trouble and expence, as ſuch an anſwer muſt neceſſarily give him. 3 *Atk.* 529, 644.

8. It is ſettled that arbitrators cannot proceed on a reference, after they have once named an umpire; for then their authority ceaſeth, tho' the time for making the award is not expired. *Rep. of Pract. in C. B.* 116. Danes and Monſay. *E.* 8 *G.* 2. *Arbitrators cannot proceed, after appointing an umpire.*

But the appointment of an umpire before their own time for making an award is expired, may be good: As in the caſe of *Doyley* and *Pitſoe*, *T.* 28 *G.* 2. An action of debt was brought upon a bond, conditioned that the parties ſhould ſubmit to the award of two arbitrators, provided they made their award on or before the 13th of March next; and if they made no award, then that they ſhould appoint an umpire before the 17th of the ſaid March. The defendant pleaded, that no award was made on or before the ſaid 13th day of March; but that they did, before the ſaid 17th of March, to wit, upon the 11th, chuſe and appoint an umpire, who had made an award. By the court: There are no words, which by any conſtruction can be intended to limit or circumſcribe the election of an umpire till after the 13th of March. The plain ſenſe of the ſubmiſſion is, that they ſhould make their award by a certain day; or in caſe they did not make it, or could not agree, that then they ſhould nominate an umpire. And they ſaid, the court has not * been nice in conſtruing the time of the umpire's appointment, provided it was ſoon enough for him to make his award. M. S. *136

E. 4 *G.* 3. *Soulſby* and *Hodgſon*. An action of debt was brought upon an arbitration bond. The arbitrators were to chuſe an umpire, in caſe they themſelves ſhould not agree within a limited time. They did not agree within the limited time, but choſe an umpire. The umpire accordingly made an umpirage: And they joined in it. The only queſtion was, whether the umpirage was duly made according to the power given to the umpire: Or whether it was vitiated and rendred void, by the arbitrators joining in it. The court were unanimous and clear, That this was the umpirage of the umpire only. He was at liberty to take what advice, or opinion, or aſſiſtants he pleaſed; and the joining

joining of the arbitrators was only ſurpluſage. *Bur. Manſf.* 1474. *Black. Rep.* 463.

Award to be conſtrued favourably, except in caſe of partiality or corruption.

9. Generally (as is aforeſaid) the award ſhall be expounded according to the intent of the arbitrators, and not literally, and ſhall not be unravelled in a court of equity, unleſs there was corruption in the arbitrators.

But in the caſe of corruption, or other unfair practice, it is enacted by the aforeſaid ſtatute of 9 & 10 *W. c.* 15. that any arbitration or umpirage procured by corruption or undue means, ſhall be deemed void, and accordingly be ſet aſide by any court of law or equity, ſo as complaint thereof be made in the court where the rule is made, before the laſt day of the next term after publiſhing the arbitration. *ſ.* 2.

But otherwiſe, as the arbitrators are perſons of the parties own chuſing, and as the law preſumes that every man will be ſo wiſe as to pitch upon a perſon whoſe underſtanding and honeſty he can rely on: it hath ſeldom happened, that an award was held void when there appeared nothing elſe to vitiate it: yet awards have been, and are often ſet aſide in a court of equity, for corruption and want of underſtanding in the arbitrators. *Compl. Arb.* 73.

Therefore it is the intereſt of both parties, to chuſe men of honeſty and underſtanding to be their arbitrators, and to acquaint them truly with the facts they are to go upon: for if they appear to be miſtaken in a matter of fact, a court of equity will ſet aſide the award. 2 *Vern.* 705.

So if the arbitrators, or any of them, appear to have been deceived: As where certain articles were ſhewn only to one of the arbitrators, and he to whom they were not ſhewn ſwore that if he had ſeen them, he believed he ſhould not have made ſuch an award.
* 137 For in * ſuch caſe, the award (according to the expreſſion in the ſtatute) is procured by *undue means*. 1 Atkyns, 64.

If a ſubmiſſion is to three arbitrators, or any two of them, and two of them by fraud or force will exclude the other; that alone is ſufficient to vitiate the award: or if they have private meetings, and admit one of the parties, but give no notice to the other, but ſuffer the attorney of the party whom they admitted, to draw up the award; ſuch award ſhall be ſet aſide for partiality and unfairneſs. 2 *Vern.* 514.

It is a general rule in equity, that when it appears that any one of the arbitrators was any way *intereſted* in the matters in controverſy, the award is to be ſet aſide. *Compl. Arb.* 75.

And it is the ſtrongeſt argument of partiality, to ſhew that the arbitrators received from either of the parties any conſiderable ſum of money, or any other preſent which may be a temptation to act corruptly; but the ſum or preſent muſt be proved to be ſo exorbitant, as to induce the court to believe that it biaſſed their judgments; otherwiſe it will be of no effect. *Compl. Arb.* 76.

In the caſe of *Shepherd* and *Brand*, T. 7 G. 2. On a rule to ſhew cauſe why an award ſhould not be ſet aſide, one exception was that before making the award, the arbitrators inſiſted upon three guineas

guineas apiece to be paid to them by each of the parties for their trouble and expences; that the defendant refuſed doing it on his part, upon which the plaintiff paid the whole money: By the court; where arbitrators, let their characters be otherwiſe never ſo unexceptionable, take money of one of the parties ſingly, whether for charges or any thing elſe, before making their award, as this is a matter of ſo tender a nature that even the appearance of evil is to be avoided, and this practice may be of dangerous example, it is ſufficient cauſe to ſet aſide the award; for if this ſhould be ſuffered, it will be hard to diſtinguiſh what is corruption. 2 *Barnardiſt.* 463. *Caſes in the time of lord Hardwicke*, 54.

In the caſe of *Lingood* and *Croucher* abovementioned, lord *Hardwicke* ſaid he remembered an inſtance in a famous caſe of *John Ward*, who being a party in a cauſe where one *John Warner* was an arbitrator, upon *Ward*'s coming into the room he ſaid, I *John Warner* will make you *John Ward* pay coſts. *Ward* complained to the court of this partial behaviour in the arbitrator; and the court inverted *Warner*'s threats, for they made *Warner* pay coſts to *John Ward*. 2 Atk. 396.

* 10. If the arbitrators award a thing to be done, it may be proper for them to appoint a time and place for the doing of it; and the party who would take advantage of it, muſt ſhew that he has done what was requiſite on his part: but if a thing is to be done generally, without mentioning time and place, it ſhall be done immediately. 2 *Brown.* 311. *138

Where the award appoints no time, the thing is to be done immediately.

11. If the ſubmiſſion is by rule of court, it is neceſſary that there be a perſonal demand of the thing awarded; and the party muſt make affidavit of ſuch demand, before he can have an attachment. 1 *Salk.* 83.

Demand to be before attachment.

12. If a ſum of money be awarded to one of the parties, and that upon the payment thereof they both ſhall give mutual releaſes; if he who is to receive the money, refuſes it, yet upon a tender and refuſal, he is as much obliged to ſign a releaſe as if he actually received it. 1 *Salk.* 75.

On tender and refuſal, the party refuſing ſhall nevertheleſs ſign a releaſe.

A Form of a ſubmiſſion by rule of court.

WHEREAS divers diſputes and controverſies have ariſen, and are now depending, between A. B. *of* ——— *in the county of* ——— *yeoman, of the one part, and* C. D. *of* ——— *in the ſaid county, yeoman, of the other part; Now for the ending and deciding thereof, it is hereby mutually agreed by and between the ſaid parties, that all matters in difference between them ſhall be referred and ſubmitted to the arbitrament, final end, and determination of* A. A. *of* ——— *in the ſaid county, gentleman,* B. A. *of* ——— *in the ſaid county, yeoman, and* C. A. *of* ——— *in the ſaid county, yeoman, or any two of them, arbitrators indifferently elected by the ſaid parties, ſo as the ſaid arbitrators, or any two of them, do make and publiſh their*

their award in writing ready to be delivered to the said parties, or such of them as shall desire the same, on or before the ——— day of ——— next ensuing the date hereof: And it is hereby mutually agreed by and between the said parties, that this submission shall be made a rule of his majesty's court of king's bench at Westminster. *In witness whereof the said parties to these presents have hereunto set their hands this ——— day of ——— in the ——— year*, &c.

B. Arbitration bond.

KNOW all men by these presents, that I A. B. *of ——— in the county of ——— gentleman, am held and firmly bound to* C. D.
*139 *of ——— in the said county of ——— yeoman, * in ——— pounds of good and lawful money of* Great Britain, *to be paid to the said* C. D. *or to his certain attorney, his executors, administrators, or assigns: To which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal, and dated the ——— day of ——— in the ——— year of the reign of our sovereign lord* George *the third, of* Great Britain, France *and* Ireland, *king, defender of the faith, and so forth, and in the year of our Lord* ———.

Condition to stand to the award of two arbitrators in common form.

THE condition of the above obligation is such, that if the above bound A. B. *his heirs, executors, and administrators, and every of them, for and on his and their parts and behalfs, do and shall well and truly stand to, obey, abide, perform, observe and keep the award, order, arbitrament, final end and determination of* A. A. *of ——— esquire, and* B. A. *of ——— gentleman, arbitrators indifferently named, elected, and chosen, as well for and on the part and behalf of the above bound* A. B. *as of the above named* C. D. *to arbitrate, award, order, adjudge and determine of and concerning all and all manner of action and actions, cause and causes of action and actions, suits, bills, bonds, specialties, judgments, executions, extents, accounts, debts, dues, sum and sums of money, quarrels, controversies, trespasses, damages and demands whatsoever, both in law and equity, or otherwise howsoever, which at any time or times heretofore have been had, made, moved, brought, commenced, sued, prosecuted, committed, omitted, done or suffered by or between the said parties, so as the said award be made in writing, and ready to be delivered to the said parties, on or before the ——— day of ——— now next ensuing; [and if the said* A. B. *his heirs, executors, or administrators, or any of them, shall not prefer or cause to be preferred, any bill in equity against the said* A. A. *and* B. A. *or either of them, for or concerning their award in the premises;] Then this obligation to be void, otherwise of force.*

If

If the parties have a mind to make their ſubmiſſion a rule of court, then this may be added:

And the abovebound A. B. *doth agree and deſire, that this his ſubmiſſion be made a rule of his majeſty's court of king's bench at* Weſtminſter, *purſuant to the act of parliament in ſuch caſe made and provided.*

* Condition to ſtand to the award of three arbitrators, or any two of them, and an umpire appointed. *140

THE condition of this obligation is ſuch, that if the abovebound A. B. *his heirs, executors, and adminiſtrators, for and on his and their parts and behalfs, ſhall and do well and truly ſtand to, obey, abide, obſerve, perform, fulfil, and keep the award, order, arbitrament, final end and determination of* ——— *or any two of them, arbitrators indifferently elected and named, as well by and on the part and behalf of the ſaid* A. B. *as by and on the part and behalf of the abovenamed* C. D. *to arbitrate, award, order, judge and determine, of and concerning all and all manner of action and actions, cauſe and cauſes of action and actions, ſuits, bills, bonds, ſpecialties, covenants, contracts, promiſes, accounts, reckonings, ſums of money, judgments, executions, extents, quarrels, controverſies, treſpaſſes, damages and demands whatſoever, at any time heretofore had, made, moved, brought, commenced, ſued, proſecuted, done, ſuffered, committed, or depending by or between the ſaid parties; ſo as the award of the ſaid arbitrators, or any two of them, be made and ſet down in writing, under their or any two of their hands and ſeals, ready to be delivered to the ſaid parties in difference, on or before the* ——— *day of* ——— *now next enſuing; then this obligation to be void, otherwiſe of force.*

And if the ſaid arbitrators ſhall not make ſuch their award of and concerning the premiſſes, within the time limited as aforeſaid, then if the ſaid A. B. *his heirs, executors, and adminiſtrators, for and on his and their part and behalf, do and ſhall well and truly ſtand to, obſerve, perform, fulfil and keep the award, determination, and umpirage* [if the umpire be named] *of* ——— *being a perſon indifferently named and choſen between the ſaid parties for umpire;* [if not named] *of ſuch perſon as the ſaid arbitrators ſhall indifferently chuſe for umpire in and concerning the premiſſes; ſo as the ſaid umpire do make and ſet down his award and umpirage in writing, under his hand and ſeal, ready to be delivered to the ſaid parties in difference, on or before the* ——— *day of* ——— *now next enſuing; and if the ſaid* A. B. *his heirs, executors, or adminiſtrators, or any of them, ſhall not prefer, or cauſe to be preferred, any bill in equity, againſt them the ſaid arbitrators and umpire, or any of them, for or concerning the award of them the ſaid arbitrators or umpire in the premiſſes: Then this obligation to be void, otherwiſe of force.*

[*And the abovebound* A. B. *doth agree and deſire, that this his ſubmiſſion be made a rule of his majeſty's court of king's* * *bench at* Weſtminſter, *purſuant to the act of parliament in ſuch caſe made.*] *141

C. Form of an award.

TO all to whom these presents shall come, we A. B. of ——— and C. D. ——— do send greeting.

Whereas there are several accounts depending, and divers controversies have arisen, between ——— of ——— yeoman, of the one part, and ——— of ——— yeoman, of the other part; And whereas, for the putting an end to the said differences, they the said ——— and ——— by their several bonds or obligations bearing date ——— last past, are reciprocally become bound each to the other, in the penal sum of ——— to stand to, abide, perform, and keep the award, order and final determination of us the said ——— so as the said award be made in writing and ready to be delivered to the parties in difference on or before ——— next ensuing, as by the said obligations and conditions thereof may appear: Now know ye, that we the said arbitrators, whose names are hereunto subscribed, and seals affixed, taking upon us the burden of the said award, and having fully examined and duly considered the proofs and allegations of both the said parties, do make and publish this our award between the said parties in manner following; that is to say, First, we do award and order, that all actions, suits, quarrels and controversies whatsoever, had, moved, arisen, and depending between the said parties in law or equity, for any manner of cause whatsoever touching the said premisses, to the day of the date hereof, shall cease and be no further prosecuted; and that each of the said parties shall pay and bear his own costs and charges in any wise relating to, or concerning the premisses. And we do also award and order, that the said ——— shall deliver or cause to be delivered to the said ——— at ——— within the space of ——— &c. And further, we do hereby award and order, that the said ——— shall on or before ——— pay or cause to be paid unto the said ——— the sum of ——— We do also award and order, &c. And lastly, We do award and order, that the said ——— and ——— on payment of the said sum of ——— shall in due form of law, execute each to the other of them, or to the other's use, general releases, sufficient in the law for the releasing by each to the other of them, his heirs, executors and administrators, of all actions, suits, arrests, quarrels, controversies, and demands whatsoever, touching or concerning the premisses aforesaid, or any matter or thing thereunto relating, from the beginning of the world, until the ——— day of ——— last past (viz. the day of the date of the arbitration
142 bonds). In witness * whereof we have hereunto set our hands and seals the ——— day of ———.

Witnesses hereof,

A. B.

C. D.

Form of an umpirage.

(RECITE the arbitration bonds, as before) Now know ye, that I ——— umpire indifferently chosen by ——— having deliberately heard and understood the griefs, allegations, and proofs of both the said parties, and willing (as much as in me lieth) to set the said parties at unity

nity and good accord, do by theſe preſents, arbitrate, award, order, decree, and judge as followeth; That is to ſay, &c.

Backing a warrant. See *WARRANT.*

BAIL.

I. What it is.
II. Difference between bail and mainpriſe.
III. When a perſon may be diſcharged without bail.
IV. Who may or may not be bailed.
V. Who may bail, and the manner of it.
VI. Requiring exceſſive bail.
VII. Denying bail where it ought to be granted.
VIII. Granting bail where it ought to be denied.
IX. Of bail by writ of habeas corpus.
X. Acknowledging bail in another man's name.

I. What it is.

BAIL (from the French *bailler*, to deliver) ſignifies the delivery of a man out of cuſtody, upon the undertaking of one or more perſons for him, that he ſhall appear at a day limited, to anſwer and be juſtified by the law. *Hale's Pl.* 96.

* *II. Difference between bail and mainpriſe.* *143

The difference between bail and mainpriſe is, that mainpernors are only ſurety, but bail is a cuſtody; and therefore the bail may retake the priſoner, if they doubt he will fly, and detain him, and bring him before a juſtice, and the juſtice ought to commit the priſoner in diſcharge of the bail, or put him to find new ſureties. *Hale's Pl.* 96.

III. Where a perſon may be diſcharged without bail.

If a perſon be brought before a juſtice, if it appears that no felony is committed, he may diſcharge him; but if a felony be committed, tho' it appears not that the party accuſed is guilty, yet he cannot diſcharge him, but muſt commit or bail him. *Hale's Pl.* 98.

IV. Who may or may not be bailed.

At the common law, bail was allowed in all caſes but homicide; but now the ſtatute of the 3 *Ed.* 1. *c.* 15. directeth what offenders ſhall be bailed, and what not. *Hale's Pl.* 97.

It is true the ſaid ſtatute only preſcribeth who ſhall or ſhall not be let to bail by the *ſheriff*; but by the 1 & 2 *P. & M. c.* 13. it is enacted that no juſtice or juſtices of the peace ſhall let to bail or mainpriſe any perſon not repleviſable by the ſaid ſtatute of 3 *Ed.* 1. *c.* 15.

Which ſtatute is as follows: *Foraſmuch as ſheriffs and others, which have taken and kept in priſon perſons detected of felony, and incontinent*

have let out by replevin ſuch as were not repleviſable, and have kept in priſon ſuch as were repleviſable, becauſe they would gain of the one party and grieve the other; and foraſmuch as before this time it was not determined which perſons were repleviſable, and which not, but only thoſe that were taken for the death of a man, or by commandment of the king, or his juſtices, or for the foreſt: It is provided, that ſuch priſoners as before were outlawed, and they which have abjured the realm, provors, and ſuch as be taken with the manner, and thoſe which have broken the king's priſon, thieves openly defamed and known, and ſuch as be appealed by provors ſo long as the provors be living (if they be not of good name,) and ſuch as be taken for houſeburning felonioufly done, or for falſe money, or for counterfeiting the king's ſeal, or perſons excommunicate taken at
144 *the requeſt of the biſhop, or for manifeſt * offences, or for treaſon touching the king himſelf, ſhall be in no wiſe repleviſable by the common writ, nor without writ. But ſuch as be indicted of larceny by inqueſts taken before ſheriffs or bailiffs by their office, or of light ſuſpicion, or for petit larceny that amounteth not above the value of 12d. if they were not guilty of ſome other larceny aforetime, or guilty of receipt of felons, or of commandment or force or of aid in felony done, or guilty of ſome other treſpaſs for which one ought not to loſe life nor member, and a man appealed by a provor after the death of the provor (if he be no common thief nor defamed), ſhall from henceforth be let out by ſufficient ſurety, whereof the ſheriff will be anſwerable, and that without giving ought of their goods.*

Sheriffs and others] That is to ſay, ſheriffs and gaolers that have cuſtody of gaols; ſo that this act extends not to any of the king's juſtices or judges of any ſuperior courts of juſtice. 2 *Inſt.* 185. But by a ſubſequent ſtatute (as hath been ſaid) it is extended to juſtices of the peace.

But only thoſe, &c] Here are firſt ſet down four ſorts of perſons which before this act were not bailable by the common writ *de homine replegiando*:

1. *Thoſe that were taken for the death of a man*] By the ancient law of the land, in all caſes of felony, if the party accuſed could find ſufficient ſureties he was not to be committed to priſon; but afterwards it was provided by parliament, that in caſe of homicide the offender was not bailable. 2 *Inſt.* 186.

And even if a perſon have dangerouſly wounded another, the juſtice ought to be very cautious how he takes bail, till the year and day be paſt; for if the party die, and the offender appear not, he is in danger of being ſeverely fined. 1 *Haw.* 138.

And this ſtatute makes no diſtinction between ſuch homicide as is malicious, and that which happens by miſadventure or in ſelf-defence, and it ſeems agreed, that juſtices of the peace, who have power at this day to bail a man arreſted for a *light ſuſpicion* of homicide, cannot bail any ſuch perſon for manſlaughter, or even excuſeable homicide, if it manifeſtly appear that he was guilty of the fact, let it be ever ſo plain that it cannot amount to murder. 2 *Haw.* 95, 105.

2. *Or by commandment of the king*] That is, by matter of record in one of his courts, according to law; and not an extrajudicial
145 commandment. 2 *Inſt.* 186, 187. So * alſo it is provided in the petition

petition of rights 3 *Car.* that no perſon ſhall be detained in priſon by the king's ſpecial command, without cauſe certified.

And becauſe ſome courts, as the king's bench, are before the king, and ſome before his juſtices, therefore the act ſaith, *by commandment of the king*, and the next words be, *or of his juſtices*. 2 Inſt. 186.

3. *Or of his juſtices*] That is, of any of the courts of *Weſtminſter*, or juſtices of aſſize. 2 *Haw.* 96.

4. *Or for the foreſt*] But as to impriſonment for offences in foreſts, the law hath been much mitigated by later ſtatutes. 2 *Haw.* 98.

All theſe four are excepted out of the common writ *de homine replegiando*, that the ſheriff in his county court, which is not a court of record, ſhall not replevy any of theſe four that are committed, altho' it ſhould be by an unlawful commitment; but the ſuperior courts at *Weſtminſter*, upon an *habeas corpus*, ſhall do juſtice to the party in all theſe four caſes. 2 *Inſt.* 187.

Next the act doth further provide, that theſe kinds of priſoners hereafter following (being 13 in number) ſhall not be repleviſable:

1. *Such priſoners as before were outlawed*] Perſons outlawed are *attainted* in law, and therefore are not bailable; for the intendment of the law is, that the perſon ſtandeth indifferent whether he be guilty or no; and not if he be convicted or attainted. 2 *Inſt.* 188.

2. *And they which have abjured the realm*] For theſe alſo are attainted upon their own confeſſion, and therefore not bailable at all by law. 2 *Inſt.* 188.

3. *Provors*] A provor, or *approver*, is a perſon that confeſſeth the felony with which he is charged, and undertakes to *prove* another guilty of the ſame crime; which if he does, he ſaves his own life, otherwiſe he ſhall be immediately executed. And the reaſon why they are not bailable is, becauſe they are guilty by their own confeſſion, and therefore they do not ſtand indifferent. 2 *Inſt.* 188.

But this concerns not juſtices of the peace, becauſe no man can become an approver before them, for that they cannot aſſign a coroner. *Hale's Pl.* 102.

4. *And ſuch as be taken with the manner*] For in this caſe likewiſe, he ſtandeth not indifferent whether he be guilty or no, being taken with the *mainer*, that is, with the thing ſtolen as it were in his *hand*, anciently called *hand-habbend*, * and the like was anciently called *back-berend*, as a bundle or ſardle at his *back*; which was uſed to ſignify manifeſt theft. 2 *Inſt.* 188. *146

5. *And thoſe which have broken the king's priſon*] Here are two offences: firſt his breaking of the priſon, for it is preſumed that he who is innocent will never break priſon: and ſecondly, his flying, becauſe he confeſſeth the fact who flies from judgment. 2 *Inſt.* 188.

6. *Thieves openly defamed and known*] Who, as it ſeems, ought not to be bailed for any freſh felony, whereof there is probable evidence againſt them. But this ſeems in a great meaſure to be left at the diſcretion of the perſon who has power to bail them, who on conſideration of the circumſtances of the whole matter, and the probabilities on both ſides, if he finds it reaſonable ſtrongly to preſume them to be guilty, ought not to bail but commit them. 2 *Haw.* 99.

7. *Such*

7. *Such as be appealed by provors ſo long as the provors be living (if they be not of good name)*] The appeal of the approver is forcible againſt the appellee, becauſe the approver confeſſeth himſelf guilty of the ſame felony, and therefore it ſerveth in nature of an indictment againſt the appellee, ſo long as the approver liveth, unleſs the appellee be of good fame. 2 *Inſt.* 188.

8. *And ſuch as be taken for houſeburning feloniouſly done*] This was felony by the common law. 2 *Inſt.* 188.

9. *Or for falſe money*] This was treaſon by the common law. 2 *Inſt.* 188.

10. *Or for counterfeiting the king's ſeal*] This was alſo treaſon by the common law. 2 *Inſt.* 188.

11. *Or perſons excommunicate taken at the requeſt of the biſhop*] That is, he that is certified into the chancery by the biſhop to be excommunicated, and after is taken by force of the king's writ of *excommunicato capiendo*, is not bailable: For in ancient times men were excommunicated but for hereſies, or other heinous cauſes of eccleſiaſtical cognizance, and not for ſmall or petty cauſes; and therefore in thoſe caſes the party was not bailable by the ſheriff or gaoler without the king's writ: but if the party offered ſufficient caution *de parendo mandatis eccleſiæ in forma juris*, then ſhould the party have the king's writ to the biſhop to accept his caution, and to cauſe him to be delivered:
*147 And if the biſhop will not ſend to the ſheriff to * deliver him, then ſhall he have a writ out of the chancery to the ſheriff for his delivery: Or if he be excommunicated for a temporal cauſe, or for a matter whereof the eccleſiaſtical court hath no cognizance, he ſhall be delivered by the king's writ without any ſatisfaction. 2 *Inſt.* 189.

12. *For manifeſt offences*] Which ſeems to be underſtood of inferior crimes of an enormous nature under the degree of felony; as dangerous riots, exorbitant reſcouſes, miſpriſion of treaſon, præmunire, and ſuch like heinous offences. Yet it ſeems to be in a great meaſure left to diſcretion to judge in what caſes their crime is ſo flagrant and enormous, that they ought not to have the benefit of it. 2 *Haw.* 99.

13. *Or for treaſon touching the king himſelf*] By the common law, a man accuſed or indicted of high treaſon, or of any felony whatſoever, was bailable upon good ſurety, until he were convicted; for at common law, the gaol was his pledge or ſurety, that could find none. 2 *Inſt.* 189.

Shall be in no wiſe repleviſable by the common writ, nor without writ] That is, the ſheriff ſhall not replevy them by the common writ *de homine replegiando*; nor without writ, that is, *ex officio*: But all or any of theſe may be bailed in the king's bench. 2 *Inſt.* 189.

Next the act ſetteth down ſeven kinds of offenders that may be bailed:

1. *Such as be indicted of larceny by inqueſts taken before ſheriffs or bailiffs*,] That is, before ſheriffs in their torns, or lords in their leets, or thoſe that have *infangthief* and *outfangthief*; that is, who have the privilege to judge thieves taken *within* their fee, or thieves dwelling within their manor and taken for felony *out* of their fee. Yet this is expounded that they be of good fame. 2 *Inſt.* 190.

2. *Or*

2. *Or of light ſuſpicion*] But if the preſumption be ſtrong, or the defamation great, the juſtices may refuſe to bail them. *Hale's Pl.* 102. And this is expounded alſo that they be of good fame. 2 *Inſt.* 190.

3. *Or for petit larceny that amounteth not above the value of* 12d. *if they were not guilty of ſome other larceny aforetime.*] This act divideth larceny into two kinds; grand larceny, when the thing ſtolen is above the value of 12d. and petit larceny when it is of the value of 12d. or under. 2 *Inſt.* 189.

* And it ſeems to be agreed, that there is no neceſſity that ſuch perſons be of good fame; yet upon the conſtruction of the whole ſtatute, if ſuch perſons be taken with the manner, or confeſs the fact, or their crime be otherwiſe open and manifeſt, it ſeems that they ought not to be bailed; but if there be any colour of probability for their innocence, it ſeems moſt agreeable to the intention of the ſtatute to bail them. 2 *Hawk.* 101. *148

4. *Or guilty of receipt of felons.*] Theſe are acceſſaries after the fact. 2 *H. H.* 100.

5. *Or of commandment or force or of aid in felony done.*] Theſe are acceſſaries before the fact. 2 *H. H.* 100.

But acceſſaries to felonies are not to be bailed, unleſs they be of good reputation: And it ſeems at this day to be ſettled, that where there are ſtrong preſumptions of guilt, ſuch acceſſaries are not bailable by this ſtatute. 2 *Haw.* 102.

6. *Or guilty of ſome other treſpaſs for which one ought not to loſe life nor member.*] But it ſeems reaſonable to qualify the generality of this expreſſion, with this limitation, that ſuch accuſation ought to be either on a light ſuſpicion, or elſe that the offence be inconſiderable, or that it be not excluded from bail by ſome ſpecial act of parliament. 2 *Haw.* 99. 2 *H. H.* 135.

7. *And a man appealed by a provor after the death of the provor if he be no common thief or defamed.* And by parity of reaſon, he may be bailed, if the approver waive his appeal, or be vanquiſhed. 2 *Haw,* 98.

Be let out by ſufficient ſurety] If a juſtice take inſufficient ſurety, and the party appear not, he is finable by the judge of aſſize. *H. P.* 97. But if the priſoner appear thereupon, the juſtice is ſafe. 2 *Haw.* 89.

And if a perſon who has power to take bail, be ſo far impoſed upon, as to ſuffer a priſoner to be bailed by inſufficient perſons, it is ſaid that either he, or any other perſon who hath power to bail him, may require the party to find better ſureties, and to enter into a new recognizance with them, and may commit him on his refuſal, for that inſufficient ſureties are no ſureties. 2 *Haw.* 89.

And the perſon who is to take the bail, may examine them on their oaths concerning their ſufficiency. 2 *Haw.* 89. 2 *H. H.* 125.

It is to be obſerved, that the above ſtatute extends only to bail in criminal offences, and therefore gives no power at * all to juſtices of the peace to bail any perſons on proceſs in civil actions, or for contempts to ſuperior courts. 2 *Haw.* 106. 149

There are furthermore many ſtatutes, which prohibit bail and mainprize in very many caſes; and allow the ſame in many others,

which

which are interſperſed among the ſeveral titles which treat of thoſe matters.

And where a ſtatute ordaineth, that an offender ſhall be impriſoned at the king's will or pleaſure, there the priſoner cannot be bailed, till he hath redeemed his liberty by ſuch fine or ranſom as ſhall be aſſeſſed by the king's juſtices in his courts. *Dalt. c.* 167.

Altho' a perſon be committed to be detained without bail or mainprize, yet if the offence be by law bailable, he that hath power of bailing may bail him. 2 *H. H.* 135.

V. Who may bail, and the manner of it.

By the common law, the ſheriff and every conſtable, being conſervators of the peace, might have bailed one ſuſpected of felony; but this authority is transferred from them to the juſtices of the peace by ſeveral ſtatutes. *Lamb.* 15.

And it ſeems to be a good general rule, that ſo far as any perſons are judges of any crime, ſo far they have power of bailing a perſon indicted before them of ſuch crime: And upon this ground it ſeems clear that any two juſtices (1 Q) may of common right bail perſons indicted at the ſeſſions, for that any two ſuc juſtices may hear and determine the indictment. Alſo it hath been holden, that any one juſtice hath the like power; and this ſeems to be implied by the ſtatute of 1 *R.* 3. *c.* 3. which giving one juſtice power of bailing perſons arreſted for felony, *in like form as if ſuch perſon had been indicted at the ſeſſions*, clearly ſuppoſes, that if ſuch perſons had been indicted at the ſeſſions, they might have been bailed by any one juſtice. And if any one juſtice had ſuch power, before the ſtatute ſpecially relating to the power of juſtices in granting bail, it ſeems that he hath ſtill the ſame power in relation to perſons ſo indicted of any bailable crime under the degree of *felony*, becauſe the ſaid ſtatutes ſeem not to reſtrain him in any ſuch caſe, under the degree of felony, from any power which he lawfully might claim before. 2 *Haw.* 103.

*150 But it ſeems difficult to maintain the power of one juſtice to bail a perſon, for any crime *before* indictment, unleſs * by ſome ſtatute it be limited to the conuſance of one juſtice, or unleſs it be an offence directly tending to the breach of the peace, the bailing of perſons for which ſeems properly to come under their conuſance as conſervators of the peace. 2 *Haw.* 105.

And Mr. *Dalton* ſays, if it is not in caſe of felony, it ſeemeth that any one juſtice alone may bail a priſoner, except where it is otherwiſe ordered in particular inſtances by ſome ſpecial ſtatute. *Dalt. c.* 12.

And it ſeems to be agreed, that any one juſtice might always in his diſcretion either bail or impriſon one who has given another a dangerous wound, according as it ſhall appear from the whole circumſtances that the party is moſt likely to live or die; for that every ſuch juſtice being a principal conſervator of the peace, the offence at preſent being only an enormous breach thereof, and no felony, ſeems properly to come under his conuſance. 2 *Haw.* 103.

But by 1 & 2 *P. & M. c.* 13. *If a perſon be arreſted for* manſlaughter *or* felony *or* ſuſpicion thereof, *being bailable by law, he*

ſhall

ſhall not be let to bail or mainpriſe by any juſtices, but in open ſeſſions, except it be by two juſtices at the leaſt (1. Q.) *and the ſame to be preſent together at the time of the ſaid bailment: Which bail they ſhall certify in writing ſubſcribed or ſigned with their own hands, at the next general gaol delivery to be holden within the county where the perſon ſhall be arreſted or ſuſpected.*

And the ſaid juſtices, or one of them, being of the quorum, when any ſuch priſoner is brought before them, for any manſlaughter or felony, before any bailment, ſhall take the examination of the ſaid priſoner, and information of them that bring him, of the fact and circumſtances thereof, and the ſame or as much thereof as ſhall be material to prove the felony, ſhall put in writing before they make the bailment: Which examination together with the bailment, the ſaid juſtices ſhall certify at the next general gaol delivery to be holden within the limits of their commiſſion.

And the ſaid juſtices ſhall have power to bind all ſuch by recognizance as do declare any thing material to prove the offence, to appear at the next general gaol delivery to give evidence againſt the party on his trial: And ſhall certify the ſame in like manner.

And any juſtice offending contrary to this act, ſhall on due proof by examination, be fined by the judges of aſſize.

But in London, Middleſex, *and in other cities and towns corporate, juſtices may let priſoners to bail, as they might before this * act; but when* they do bail, they are to take and certify the bail and examination as is here directed. 151

VI. Requiring exceſſive bail.

By the declaration of rights 1 *W. ſeſſ.* 2. *c.* 2. exceſſive bail ought not to be required.

VII. Denying bail where it ought to be granted.

To refuſe bail where the party ought to be bailed (the party offering the ſame) is a miſdemeanor puniſhable not only by the ſuit of the party, but alſo by indictment. 2 *Haw.* 90. *H. P.* 97.

VIII. Granting bail where it ought to be denied.

Admitting bail where it ought not, is puniſhable by the judges of aſſize by fine; or puniſhable as a negligent eſcape at common law. *H. P.* 97.

If the keeper of a priſon bail any not bailable, he ſhall loſe his fee and office; if another officer, he ſhall have three years impriſonment, and make fine at the king's pleaſure. 3 *Ed.* 1. *c.* 15.

M. 18 *G.* 2. *K.* and *William Clarke*, eſquire. He as a juſtice of *Surry* committed a man on ſuſpicion of ſtealing a mare, and bound over the owner to proſecute. Afterwards upon examining two other perſons he admitted the party to bail. The proſecutor appeared at the aſſizes, and found a bill, but the party accuſed did not appear.

And the court granted an information againſt the juſtice, declaring they ſhould not have bailed the man themſelves. *Str.* 1216.

IX. Of bail by writ of habeas corpus.

If bail cannot otherwiſe be obtained, the law hath provided a remedy in moſt caſes by the *habeas corpus* act 31 G. 2. *c.* 2. The ſubſtance of which is briefly thus:

If the commitment is for treaſon or felony plainly and ſpecially expreſſed in the warrant of commitment; alſo if any perſon is committed and charged as acceſſary before the fact to any petty treaſon or felony, or upon ſuſpicion thereof, or with ſuſpicion of petty treaſon or felony, which petty treaſon or felony ſhall be plainly and ſpecially expreſſed in the warrant of commitment: in ſuch caſes the perſon ſhall not be bailed on a writ of habeas corpus; *otherwiſe he may be bailed.*

* 152 * *Alſo if a perſon is committed for treaſon or felony ſpecially expreſſed, yet if he ſhall in open court the firſt week of the term, or firſt day of aſſize, petition to be tried, and ſhall not be indicted ſome time in the next term or aſſize after the commitment, he ſhall upon motion the laſt day of the term or aſſize, be bailed, unleſs it ſhall appear to the judge upon oath that the king's witneſſes could not be produced within that time, and then if he is not tried in the ſecond term or aſſize, he ſhall be diſcharged.*

Previous to the aforeſaid bailment, the priſoner or ſome perſon on his behalf, ſhall demand of the officer or keeper, a true copy of the warrant of commitment, which he ſhall deliver in ſix hours, on pain of 100*l.* *to the party grieved for the firſt offence, and* 200*l.* *and forfeiture of his office for the ſecond.*

Then application is to be made in writing by the priſoner or any perſon for him, atteſted and ſubſcribed by two witneſſes who were preſent at the delivery thereof to the court of chancery, king's bench, common pleas, or exchequer, or if out of term time, to the lord chancellor or one of the judges; and a copy of the warrant of commitment ſhall be produced before them, or oath made that ſuch copy was denied.

But if any perſon hath wilfully neglected by the ſpace of two terms to apply for his enlargement, he ſhall not have a habeas corpus *granted in the vacation.*

This being done, the lord chancellor, or judges reſpectively, ſhall award an habeas corpus *under the ſeal of the court on pain of* 500*l.* *to be marked in this manner,* Per ſtatutum triceſimo primo Caroli ſecundi regis, *and ſigned by the perſon that awards the ſame; and ſhall be directed to the officer or keeper, returnable* immediate.

And the charges of bringing the priſoner ſhall be aſcertained by the judge or court that awarded the writ, and indorſed thereon, not exceeding 12*d.* *a mile.*

Then the writ ſhall be ſerved on the keeper, or left at the gaol with any of the under-officers; and the charges ſo indorſed, ſhall be paid or tendred to him, and the priſoner ſhall give bond to pay the charges of carrying him back if he ſhall be remanded, and that he will not make any eſcape by the way.

The

This done the officer ſhall within three days after ſervice (if it is within twenty miles) return the writ, and bring the body, and ſhall then likewiſe certify the true cauſe of the impriſonment; if above twenty miles and leſs than an hundred, then within ten days; if above an hundred, then within twenty days; on like pain as before.

But after the aſſizes are proclaimed for the county where the priſoner is detained he ſhall not be removed.

* *Then if it ſhall appear to the ſaid lord chancellor or judges, that the priſoner is detained on a legal proceſs, order or warrant, out of ſome court that hath juriſdiction of criminal matters, or by warrant of a judge or juſtice of the peace for matters for which by law he is not bailable; in ſuch caſe the priſoner ſhall not be diſcharged.* * 153

If he ſhall be diſcharged, he ſhall thereupon enter into recognizance to appear on his trial; and the writ, and return thereof, and recognizance ſhall be certified into the court where the trial muſt be.

But perſons charged with debt, or other action, or with proceſs in any civil cauſe, after their diſcharge for a criminal offence, ſhall be kept in cuſtody for ſuch other ſuit.

And perſons ſo ſet at large, ſhall not be recommitted for the ſame offence, unleſs by order of court; on pain of 500*l. to the party grieved.*

Two things I ſhall obſerve upon this ſtatute:

1. That altho' the conſtable by his own authority, without any warrant of commitment, may carry offenders to gaol, and this was the method of ſecuring priſoners before there were any juſtices of the peace; yet ſince the inſtitution of the office of juſtices of the peace, it is better that they be carried before a juſtice, to be ſent by him to gaol by warrant of commitment; otherwiſe they have a right to be bailed upon this act, whatever the offence may be.

2. That the warrant of commitment ought to ſet forth the cauſe ſpecially; that is to ſay not for treaſon, or felony in general, but treaſon *for counterfeiting the king's coin*, or felony *for ſtealing the goods of ſuch a one to ſuch a value*, and the like; that ſo the court may judge thereupon, whether or no the offence is ſuch, for which a priſoner ought to be admitted to bail.

X. Acknowledging bail in another man's name.

By the 21 *J. c.* 26. *If any perſon ſhall acknowledge, or procure to be acknowledged, any bail in the name of any other not privy to the ſame; he ſhall be guilty of felony without benefit of clergy.*

In the name of any other] *T.* 6 *G.* Two people put in bail in feigned names, and becauſe there were no ſuch perſons, they could not be proſecuted for perſonating bail on this ſtatute. So the court ordered them and the attorney to be ſet in the pillory, which was done accordingly. *Str.* 384.

* Bail taken before a judge is not within this ſtatute, till it be filed of record. 1 *H. H.* 696. But it is within the following ſtatute of 4 *W. c.* 4. by which it is enacted, that *any who ſhall perſonate another before thoſe who have authority to take bail, ſo as to make him liable to* * 154

the payment of any ſum of money in that ſuit or action, ſhall be guilty of felony (but within clergy.)

Form of Bail.

Weſtmorland. *BE it remembered, that on the ——— day of ——— in the ——— year of the reign of ———* A. O. *of ——— yeoman,* A. B. *of ——— yeoman, and* B. B. *of ——— yeoman, came before us* John Moore, *eſquire, and* Richard Burn, *doctor of laws, two of his majeſty's juſtices of the peace in and for the ſaid county, one whereof is of the quorum, and ſeverally acknowledged themſelves to owe to our ſaid lord the king, that is to ſay, the ſaid* A. O. 20*l. and the ſaid* A. B. *and* B. B. 10*l. each, to be reſpectively levied of their lands and tenements, goods and chattles, if the ſaid* A. O. *ſhall make default in the performance of the condition indorſed,* [*or underwritten.*]

John Moore,
Richard Burn.

The condition of this recognizance is ſuch, that if the within [*above*] *bound* A. O. *ſhall perſonally appear before the juſtices of our ſovereign lord the king aſſigned to keep the peace within the ſaid county, and likewiſe to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in the ſaid county committed, at the next general quarter ſeſſions of the peace* [or, *before his majeſty's juſtices of gaol delivery at the next general gaol delivery*] *to be holden in and for the ſaid county, then and there to anſwer to our ſaid ſovereign lord the king, for and concerning the felonious taking and ſtealing of ——— the property of* A. M. *of ——— yeoman, with the ſuſpicion whereof the ſaid* A. O. *ſtands charged before us the ſaid juſtices, and to do and receive what ſhall by the court be then and there enjoined him, and ſhall not depart the court without licence, then the above* [*within*] *written recognizance ſhall be void.*

Or, if the party is in priſon, and ſo abſent, Lord *Hale* ſays, this is the true form from *Lambard.*

Weſtmorland. *BE it remembred, that on the ——— day of ——— in the ——— year of the reign of ——— before us*
* 155 John Moore, *eſquire, and* Richard Burn * *doctor of laws, two of the juſtices of our ſaid lord the king, aſſigned to keep the peace within the ſaid county, and one of us of the quorum,* at Grimeſhill *in the ſaid county, did come* A. B. *and* B. B. *of ——— in the ſaid county, yeomen, and took in bail until the next gaol delivery to be holden in the ſaid county, one* A. O. *of ——— labourer, taken and detained in priſon for ſuſpicion of a certain felony in ſtealing ——— the property of ——— and took upon themſelves each of the ſaid* A. B *and* B B. *under the penalty of* 20*l. of good and lawful money of* Great Britain, *of the goods and chattles, lands and tenements, of them and each of them, to the uſe of our ſaid lord the king, his heirs and ſucceſſors, to be levied, if the ſaid* A. O. *ſhall not perſonally appear at the ſaid next gaol delivery, before the juſtices of our ſaid lord the king,*

aſſigned

aſſigned to deliver the ſaid gaol, to ſtand to right concerning the felony aforeſaid, according to the law and cuſtom of England. *Given under our ſeals*, &c.

But the ſeal need not be, for they are judges of record; only it may be barely ſubſcribed by them: or thus,

Taken and acknowledged the day and year above written, before us the aboveſaid
John Moore,
Ri. Burn.

And hereupon a warrant iſſues for his deliverance, thus:

Weſtmorland. JOHN Moore, *eſquire, and* Richard Burn, *doctor of laws, two of the juſtices of* ——— *and one of us of the quorum, To the keeper of his majeſty's gaol at* ——— *in the ſaid county, greeting. Foraſmuch as* A. O. *of* ——— *labourer, hath before us, found ſufficient ſuretics to appear before the juſtices of gaol delivery at the next general gaol delivery to be holden in the ſaid county, to anſwer to ſuch things as ſhall be then on the behalf of our ſaid ſovereign lord objected againſt him, and namely, to the felonious taking of* ——— *(for the ſuſpicion whereof he was taken and committed to your ſaid gaol): We command you on the behalf of our ſaid ſovereign lord that if the ſaid* A. O. *do remain in your ſaid gaol for the ſaid cauſe, and for none other, then you forbear to detain him any longer, but that you deliver him thence, and ſuffer him to go at large, and that upon the pain that will thereon enſue. Given under our ſeals at* Orton *in the ſaid county, the* ——— *day of* ——— *in the* ——— *year* ———.

* Lord *Hale* ſays, the advantage of this latter kind of bail is this,* that it is not only a recognizance in a ſum certain, but alſo a real bail, and they are his keepers, and may be puniſhed by fine beyond the ſum mentioned in the recognizance, if there be cauſe; and may reſeize him if they doubt his eſcape, and have him committed, and ſo be diſcharged of the recognizance. 156

BANKS DESTROYING.

1. EVERY perverſe and malicious perſon, cutting down and breaking up of any part of the dike called *New Powdike* in *Marſhland* in the county of *Norfolk*, and the broken dike called *Oldfield dike* by *Marſhland* in the iſle of *Ely*, or of any other bank being parcel of the rind and uppermoſt part of the ſaid county of *Marſhland*, made for the defence and ſalvation of the ſaid county of *Marſhland*, ſhall be adjudged felony. And the ſeſſions may determine the ſame. 22 *H.* 8. c. 11. *Powdike.*

2. By

Sea and river banks.

2. By the 6 *G.* 2. *c.* 37. If any perſon ſhall unlawfully and maliciouſly break down or cut down the bank of any river or any ſea-bank, whereby any lands ſhall be overflowed or damaged; he ſhall be guilty of felony without benefit of clergy. *ſ.* 5.

Piles for ſecuring banks.

3 And moreover, by the ſtatue of 10 *G.* 2. *c.* 32. if any perſon ſhall unlawfully cut off, draw up, or remove and carry away any piles, chalk or other materials, driven into the ground, and uſed for the ſecuring any marſh or ſea walls, or banks, in order to prevent the lands lying within the ſame from being overflowed and damaged; on complaint or information thereof made upon oath to any juſtice reſiding near the place, ſuch juſtice ſhall ſummon the party complained of, or ſhall iſſue his warrant to apprehend and bring ſuch perſon before him, and upon his appearance, or neglect to appear, he ſhall proceed to examine the fact, and upon due proof thereof made either by confeſſion, or oath of one witneſs, ſhall convict the offender; who ſhall thereupon forfeit 20l. half to the informer, and half to the overſeer for the uſe of the poor, to be levied by diſtreſs and ſale: for want of ſufficient diſtreſs, to be committed to the houſe of correction, to be kept to hard labour for ſix months. *ſ.* 5.

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*BANKRUPT.

Derivation.

1. LORD *Coke* ſays, that *banque* in *French* ſignifies the ſame as *menſa* in *Latin*; and that *route* is a ſign or mark, as we ſay a cart rout is the ſign or mark where the cart hath gone; and that metaphorically a *bankrupt*, or *banqueroute*, is taken for him, that hath waſted his eſtate, and removed his banque ſo as there is left but a mention thereof. 4 *Inſt.* 277.

But as the firſt bankers came to us from *Italy*, it ſeemeth more probable that they brought their name along with them; and conſequently that the word *bankrupt* or *banqueroute* cometh from the Italian *banco rotto*, the *bench* being *broken*. The *banker* himſelf was ſo called from the *bench* or table which he uſed, with his name inſcribed, and when he failed, his bench was broken. Which word *rotto* is what remaineth in that country of the Latin *ruptus*; all which, both word and metaphor we preſerve in our language, when we ſay that a perſon is *bankrupt*, or that ſuch a one is broken.

Deſcription of a bankrupt.

2. The deſcription of a bankrupt, within the ſeveral ſtatutes brought together into one view, ſeemeth to be as follows: *Every perſon uſing the trade of merchandize, by way of bargaining, exchange, bartry, chevyſance, or otherwiſe, in groſs, or by retail, or ſeeking his trade of living by buying and ſelling, or that ſhall uſe the trade or profeſſion of a ſcrivener receiving other mens monies or eſtates into his truſt or cuſtody, who ſhall* (1) *depart the realm*; *or* (2) *begin to keep his houſe, or otherwiſe to abſent himſelf*; *or*, (3) *take ſanctuary*; *or*, (4) *ſuffer*

ſuffer himſelf willingly to be arreſted for any debt or other thing not grown or due for money delivered, wares ſold, or any other juſt or lawful cauſe or good conſideration or purpoſes; or (5) *ſhall ſuffer himſelf to be outlawed; or* (6) *yield himſelf to priſon; or* (7) *willingly or fraudulently ſhall procure himſelf to be arreſted, or his goods to be attached or ſequeſtred; or* (8) *depart from his dwelling houſe; or* (9) *make any fraudulent grant or conveyance of his lands or goods, to the intent or whereby his creditors ſhall and may be defeated or delayed for the recovery of their juſt debts; or* (10) *ſhall obtain any protection, other than ſuch perſon as ſhall be lawfully protected by privilege of parliament; or* (11) *ſhall prefer to any court any petition or bill againſt any of his creditors, thereby endeavouring to enforce them to accept leſs than their juſt debts, or to procure time, or longer days of payment than was given at the time of their original contract; or* (12) *being arreſted for debt, ſhall lie in priſon two months; or* (13) *being arreſted for* 100l. *or more, * ſhall eſ-** 158
cape out of priſon,—ſhall be adjudged a bankrupt; (and in the ſaid caſes of arreſt, or lying in priſon, from the time of his firſt arreſt.) 1 J. c. 15. ſ. 2. 21 J. c. 19. ſ. 2. 15. 10 An. c. 15. ſ. 1.

Every perſon] An *Iriſhman*, who trades and hath contracted debts in England, and comes over here, may have a commiſſion iſſued againſt him, at the petition of the creditors here; and the Iriſh creditors alſo upon the commiſſion may come in and prove their debts. And generally, if a perſon carries on a trade in any place belonging to the crown of Great Britain, and comes into England; a commiſſion may be taken out by the creditors in England. And there have been ſeveral inſtances, where perſons belonging to the plantations abroad, and which is their ſole place of reſidence, yet happening to be in England; have had commiſſions of bankruptcy taken out againſt them here. 1 *Atkyns* 82.

A *clergyman* if he trades, may be a bankrupt; for tho' by the 21 *H.* 8. *c.* 12. he is prohibited to trade, and his contracts in that kind are declared to be void, yet they are void with reſpect to himſelf only, and he ſhall not take advantage of the breach of one law, in order to avoid his being ſubject to another. 1 *Atk.* 199.

An *infant*, tho' a trader, cannot be a bankrupt; for an infant can owe nothing but for neceſſaries; and the ſtatutes of bankruptcy create no new debts, but only give a ſpeedier and more effectual remedy for recovering ſuch as were before due. And no perſon can be made a bankrupt for debts, which he is not liable at law to pay. 2 *Blackſt.* 477.

The daughter of a freeman of London, being a *married woman*, if ſhe trades ſeparately from her huſband, may be a bankrupt. 1 *Atk.* 206.

Uſing the trade of merchandize] As by exerciſing the calling of a merchant, a grocer, mercer, or in one general word a *chapman*, who is one that buys and ſells any thing. 2 *Blackſt.* 477.

But one ſingle act of buying and ſelling will not make a man a trader; but there muſt be a repeated practice, and profit by it. 2 *Blackſt.* 476.

Of

Of merchandize] But no perſon who ſhall adventure any money in the Eaſt India company, and ſhall receive his dividend in merchandize, and ſhall ſell or exchange the ſame, ſhall be judged thereby a merchant or trader within any ſtatute for bankrupts. 13 & 14 *C.* 2. *c.* 24. *ſ.* 3, 4.

* 159 * And generally, buying and ſelling ſtock in the public funds, or government ſecurities, will not make a man a bankrupt; the ſame not being goods, wares, or merchandize, within the intent of the ſtatute, by which a profit may be fairly made. 2 *Blackſt.* 476.

So alſo the members of the corporation of the Engliſh *linen company* (for making cambricks and lawns), ſhall not upon that account only be liable to bankruptcy. 4 *G.* 3. *c.* 37.

Seeking his trade of living by buying and ſelling] He that buys only, or ſells only, is not within this deſcription; but it muſt be both buying and ſelling, and alſo getting a livelihood by it. 2 *Blackſt.* 476.

Alſo, by ſpecial ſtatute, 5 *G.* 2. *c.* 30. No *farmer*, *grazier*, or *drover* of cattle, ſhall be deemed a bankrupt, *ſ.* 40.——But if ſuch farmer or other ſhall deal in wool, hops, or the like, he ſhall be deemed a bankrupt; otherwiſe any perſon by taking a farm, might avoid the ſtatutes. And in the caſe of *Moyo* and *Archer*, *E.* 8 *G.* a farmer who planted potatoes, but withal bought divers large quantities of potatoes, and ſold the ſame again, was adjudged a bankrupt. *Str.* 513.

Alſo, no *handicraft occupation*, where nothing is bought and ſold, will make a man a bankrupt; as that of a huſbandman, a gardener, and the like, who are paid for their work and labour. 2 *Blackſt.* 476.

Alſo, an *innkeeper* or *victualler* cannot, as ſuch, be a bankrupt; for his gain or livelihood doth not ariſe from buying and ſelling in the way of merchandize, but greatly from the uſe of his houſe, furniture, attendance, and the like: and though he may buy corn and victuals, to ſell again at a profit, yet that no more makes him a trader, than a ſchoolmaſter or other perſon is, that keeps a boarding houſe and makes conſiderable gains by buying and ſelling what he ſpends in the houſe, and ſuch an one is clearly not within the ſtatute. 2 *Blackſt.* 476. *Burr. Manſf.* 2064.

But where perſons buy goods and make them up into ſaleable commodities, as *ſhoemakers*, *ſmiths*, *bakers*, and the like; here, tho' part of the gain is by bodily labour, and not by buying and ſelling, yet they are within the ſtatutes of bankrupts: for the labour is only in melioration of the commodity, and rendering it more fit for ſale. 2 *Blackſt.* 476.

So alſo, for the like reaſon, a *butcher* is within the ſtatute of bankruptcy. *Bur. Manſf.* 2148.

* 160 But where a perſon bought a *coal mine*, and worked the mine, and ſold the coals, he was adjudged not to be within * the ſtatutes for bankrupts: But otherwiſe it would have been, if he had bought the coals and ſold the ſame again. 2 *Wilſ.* 169.

Or that ſhall uſe the trade or profeſſion of a ſcrivener, receiving other mens monies or eſtates into his truſt or cuſtody] Bankers, brokers, and factors are within this deſcription. 5 *G.* 2. *c.* 30. *ſ.* 39.

So alſo *pawnbrokers*, as it ſeemeth; being comprehended under the general

general word *brokers*, which includes the ſeveral ſpecies of brokerage. 1 *Atk.* 206.

But no receiver-general of any taxes granted by act of parliament, ſhall be deemed a bankrupt. 5 *G.* 2. *c.* 30. *ſ.* 40.

Begin to keep his houſe, or otherwiſe to abſent himſelf] If a man keeps his houſe for a long time, this doth not immediately make him a bankrupt; but if he conceals himſelf within his houſe for a day or hour, to delay or defraud his creditors, he is a bankrupt. 1 *Bac. Abr.* 250.

Obtain any protection, other than ſuch perſon as ſhall be lawfully protected by privilege of parliament] By the 4 *G.* 3. *c.* 33. in reſpect to perſons having privilege of parliament, it is enacted, that the petitioners, on affidavit in any of his majeſty's courts of record at Weſtminſter, that the debt is juſtly due, and that they verily believe that the debtor is a merchant, banker, broker, factor, ſcrivener, or trader, within the ſtatutes of bankruptcy, may ſue out a ſummons, or an original bill and ſummons, againſt ſuch perſon, and ſerve him with a copy thereof; and if he ſhall not within two months after perſonal ſervice of ſuch ſummons, pay, ſecure, or compound for ſuch debt, or enter into a bond in ſuch ſum and with two ſuch ſureties as any of the judges of that court out of which the ſummons iſſued ſhall approve of, to pay ſuch ſum as ſhall be recovered in ſuch action, together with ſuch coſts as ſhall be given in the ſame, he ſhall be adjudged a bankrupt from the time of the ſervice of ſuch ſummons, and the creditors may proceed againſt him as againſt other bankrupts. Provided, that this ſhall not extend to any debt contracted before March the 8th, 1764. And provided alſo, that nothing herein ſhall ſubject any perſon intitled to privilege of parliament to be arreſted or impriſoned during the time of ſuch privilege, except in caſes made felony by any of the ſtatutes of bankruptcy.

For what debts a commiſſion ſhall be iſſued, and what is to be done previous thereto.

3. But notwithſtanding that a perſon may have committed any of the aboveſaid acts of bankruptcy, yet nevertheleſs *no commiſſion of bankrupt ſhall be iſſued on the petition of* * *one or more creditors, unleſs the ſingle debt of ſuch creditor, or of two or more being partners, amount to* 100l. *or of two ſuch creditors petitioning amounts to* 150l. *or of three or more to* 200l. 5 *G.* 2. *c.* 30. *ſ.* 23. *161

And the creditor or creditors petitioning, ſhall before the commiſſion ſhall be granted, make affidavit before a maſter in chancery (to be filed with the proper officer) of the truth of the debt, and ſhall alſo give 200l. bond to the lord chancellor for proving the debt as well before the commiſſioners, as upon a trial at law, if the due iſſuing of the commiſſion ſhall be conteſted, and alſo for proving the party a bankrupt, and farther to proceed on ſuch commiſſion as hereafter is mentioned: and if it ſhall appear, that the commiſſion was taken out fraudulently, the lord chancellor may order ſatisfaction, and may aſſign ſuch bond to the party injured. *ib.*

Iſſuing the commiſſion.

4. But theſe circumſtances abovementioned being obſerved, then the lord chancellor may on ſuch complaint in writing as aforeſaid, by commiſſion under

the great ſeal, appoint ſuch wiſe and honeſt diſcreet perſons as to him ſhall ſeem good to be commiſſioners. 13 *El. c.* 7. *ſ.* 2.

Commiſſioners oath.

5. Which commiſſioners before they act, ſhall adminiſter to each other the following oath: "I *A. B.* "do ſwear that I will faithfully, impartially, and ho- "neſtly, according to the beſt of my ſkill and know- "ledge, execute the ſeveral powers and truſts repoſed in me as a com- "miſſioner in a commiſſion of bankrupt againſt —— and that with- "out favour or affection, prejudice or malice. So help me God." 5 *G.* 2. *c.* 30. *ſ.* 43.

And they ſhall keep a memorial thereof ſigned by them, amongſt the proceedings. *id. ſ.* 44.

Notice in the Gazette of the commiſſion being iſſued.

6. Then the commiſſioners ſhall cauſe notice of the commiſſion being iſſued to be given in the Gazette, and likewiſe notice in writing to be left at the bankrupt's uſual place of abode, or perſonal notice to be given if he is in priſon. 5 *G.* 2. *c.* 30. *ſ.* 1.

Bankrupt to ſurrender.

7. In which notice alſo ſhall be appointed a time and place of meeting of the commiſſioners; which meeting ſhall be at three ſeveral times within forty-two days, the laſt of which ſhall be on the forty-ſecond day; within which time the bankrupt ſhall ſurrender himſelf, and diſcover his eſtate and effects. 5 *G.* 2. *c.* 30. *ſ.* 1, 2.

But the lord chancellor may enlarge the time for ſuch ſurrender and diſcovery, not exceeding fifty days from the end of the ſaid forty-two days; ſo as ſuch order be made by him, ſix days before the expiration of the forty-two. *id. ſ.* 3.

* 162 *Creditors to come in.*

* 8. A creditor may chuſe whether he will come in under the commiſſion or not: But if he chuſes to come in, he cannot proceed at law likewiſe for the ſame debt. Therefore if a creditor has the bankrupt in execution, he muſt diſcharge him from the execution, before he can be admitted as a creditor under the commiſſion. And a petitioning creditor, by the very petition hath made his election. 1 *Atk.* 83, 152.

Chuſing aſſignees.

9. The firſt meeting ſhall be for chuſing an aſſignee or aſſignees of the bankrupt's eſtate and effects (which in *London* ſhall be at *Guildhall*). 5 *G.* 2. *c.* 30. *ſ.* 26.

The money with whom to be lodged.

10. But before aſſignees are choſen, the major part in value of the creditors may direct how and with whom the money to be received ſhall remain till divided: to which the aſſignees ſhall conform, as often as 100*l.* ſhall be got in. 5 *G.* 2. *c.* 30. *ſ.* 32.

Expences of the commiſſion.

11. And the creditor or creditors who ſhall ſue out the commiſſion, ſhall proſecute the ſame at their own expence till aſſignees be choſen; and the commiſſioners ſhall at the meeting for chuſing aſſignees aſcertain ſuch coſts, and by writing under their hands order the aſſignees to reimburſe the ſame, out of the firſt effects that ſhall be got in. 5 *G.* 2. *c.* 30. *ſ.* 25.

12. At

12. At the ſaid meeting for chuſing aſſignees, the commiſſioners ſhall admit the proof of any creditor's debt, that lives remote from the place of meeting, by affidavit; and alſo permit any perſon duly author zed by letter of attorney from ſuch creditors (oath being firſt made of the due execution thereof, either by affidavit ſworn before a maſter in chancery, or before the commiſſioners *viva voce*; and in caſe of creditors reſiding in foreign parts, ſuch affidavits to be made before a magiſtrate where the party ſhall be reſiding, and together with ſuch creditors letters of attorney, to be atteſted by a notary publick) to vote in the choice of an aſſignee or aſſignees in the place of ſuch creditor: And every creditor ſhall be admitted to prove his debt, without paying any thing for the ſame. And the commiſſioners ſhall aſſign the eſtate and effects unto ſuch perſon or perſons as the major part in value of the creditors, according to the debts then proved, ſhall chuſe. 5 *G.* 2. *c.* 30. *ſ.* 25, 26. *Who ſhall vote for aſſignees.*

But no creditor ſhall ſo vote, whoſe debt ſhall not amount to 10l. *id. ſ.* 27.

13. And the commiſſioners may from time to time appoint new aſſignees, if the major part of the creditors, whoſe debts amount to 10l. ſhall think fit; and the former aſſignees ſhall aſſign to them in ten days after notice of * ſuch choice, and of the new aſſignees acceptance thereof, ſignified under their hands; on pain of 200l. to the creditors, with full coſts. 5 *G.* 2. *c.* 30. *ſ.* 30. *Chuſing new aſſignees.* * 163

And the lord chancellor, on petition of any creditors, may order former aſſignments to be vacated, and new aſſignments to be made of the effects not received; and the commiſſioners ſhall cauſe notice thereof to be given in the two next Gazettes, and that the debtors do not pay to the aſſignees removed. *id. ſ.* 31.

And the new aſſignees, on filing a ſupplemental bill, ſhall be entitled to the benefit of the proceedings in a ſuit begun in the time of the firſt aſſignees; for there is no privity between the bankrupt and the aſſignees, or at moſt but an artificial one; and it would be hard, where there have been pleadings, examinations, and the like, in a former ſuit, that the new aſſignees ſhould not have the benefit thereof, but ſhould be obliged to begin again. 1 *Atk.* 88.

14. On certificate under the hands and ſeals of the commiſſioners, that ſuch commiſſion is iſſued, and ſuch perſon proved before them to become bankrupt, any judge or juſtice of the peace, ſhall on application to them for that purpoſe made, grant their warrant (A) for the taking and apprehending ſuch perſon, and commit (B) him to the common gaol, there to remain until he be removed by order of the commiſſioners by their warrant. And the gaoler ſhall forthwith give notice to one or more of the commiſſioners, of ſuch perſon being in his cuſtody; whereupon they ſhall ſend their warrant to him to deliver him to the perſon who ſhall be named in the warrant, who ſhall convey him to the commiſſioners to be examined. And the commiſſioners by ſuch or any other their warrant may ſeize the goods and papers of ſuch bankrupt which ſhall be in *Bankrupt not ſurrendring to be apprehended.*

any priſon (neceſſary wearing apparel of himſelf and wife, and children excepted.) 5 G. 2. c. 30. ſ. 14.

But if the perſon ſo apprehended ſhall, within the time allowed, ſubmit to be examined, and in all things conform, he ſhall have the ſame benefit as if he had ſurrendred. 5 G. 2. c. 30. ſ. 15.

By which laſt clauſe it ſeemeth, that the bankrupt ſhall not be apprehended and committed, until he ſhall have made default in not ſurrendring and making diſcovery, after due notice as aforeſaid.

Bankrupt to deliver up.

15. The bankrupt, after aſſignees ſhall be appointed, ſhall deliver up to them on oath (to be adminiſtred by a maſter in chancery, or juſtice of the peace) all his books * of account, papers, and writings not ſeized by the meſſenger of the commiſſion, and not before delivered up, and then in his power, and diſcover ſuch as are in the power of others; and being not in cuſtody, ſhall, at all times attend the aſſignees, on reaſonable notice given to him in writing, or left for him at his place of abode, in order to aſſiſt in making out the account of his eſtate. 5 G. 2. c. 30. ſ. 4.

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Bankrupt to be at liberty to inſpect his papers.

16. And ſuch bankrupt having ſurrendred, ſhall at all ſeaſonable times, before the expiration of forty-two days, or further term, be at liberty to inſpect his papers, in preſence of the aſſignees, or ſome perſon appointed by them, and to bring with him for his aſſiſtance any perſons not exceeding two at a time, and to make extracts from thence, the better to enable him to diſcover his effects. 5 G. 2. c. 30. ſ. 5.

Shall be freed from arreſt.

17. And in order thereto, he ſhall be free from arreſt or impriſonment of his creditors, in coming to ſurrender, and from his ſurrender, for the ſaid forty-two days or further term; provided he was not in cuſtody at the time of ſurrender. And if he be arreſted for debt, or on an eſcape warrant, coming to ſurrender or after ſurrender within the ſaid term; then, on producing the notice under the hands of the commiſſioners or aſſignees, to the officer who ſhall arreſt him, and making it appear to ſuch officer that ſuch notice is ſigned by them, and giving the officer a copy thereof, he ſhall be immediately diſcharged: And if any officer ſhall in ſuch caſe detain him, he ſhall forfeit to him for his own uſe 5l. a day, by action of debt, with full coſts. *id.*

Bankrupt in priſon when the commiſſion is iſſued.

18. And if the bankrupt be in priſon or cuſtody at the time of iſſuing the commiſſion, and is willing to ſurrender and be examined, and can be brought before the commiſſioners and creditors, the expence thereof ſhall be paid out of his eſtate: But if he is in execution, or cannot be brought before the commiſſioners, then they ſhall attend him in priſon, and the aſſignees may appoint a perſon to attend him in priſon, and to produce him his books and papers, in order to prepare his laſt diſcovery and examination; a copy whereof the aſſignees ſhall apply for, and the bankrupt ſhall deliver to them, ten days before ſuch laſt examination. 5 G. 2. c. 30. ſ. 6.

19. And

19. And the commiſſioners may examine him (on oath, 21 *J. c.* 19. *ſ.* 9.) *as well by word of mouth, as on interrogatories in writing*, touching his trade, dealings, eſtate, and effects; and take down in writing his anſwer to verbal examinations; which he ſhall ſign: And if he ſhall refuſe * to anſwer, *or not anſwer fully* all lawful queſtions, or refuſe to ſign the ſame; the commiſſioners may by warrant commit him to priſon without bail, *till he ſhall ſubmit to them, and full anſwer make*, and ſign the ſame; which warrant ſhall ſpecify ſuch queſtions. 5 *G.* 2. *c.* 30. *ſ.* 16, 17. *Bankrupt to be examined.* *165

As well by word of mouth, as on interrogatories in writing] *M.* 4. *G.* 2. *K.* and *Solomon Nathan.* The defendant was committed by the commiſſioners, who in their warrant recite, that he had been examined before them upon his oath, upon which examination he had notoriouſly prevaricated; they therefore commit him without bail or mainprize, until he ſhall make a full and true diſcloſure and diſcovery of his eſtate and effects, or be otherwiſe delivered by due courſe of law. Upon a *habeas corpus* it was moved, that the defendant might be diſcharged. One reaſon whereof was becauſe the ſtatute requires, that there ſhall be interrogatories exhibited for his examination, that ſo he may have time to conſider of his anſwer, and it can then appear to the court, whether he is bound to anſwer: perhaps this prevarication might be in a matter they had no power to inquire into. And by the court; Interrogatories are a term known in law, and import that the queſtions are put in writing. And they ſaid that *Holt* Ch. J. held, that the bankrupt ought to have a copy, and time to conſider of his anſwer. *Str.* 880.

Or not anſwer fully] In the aforeſaid caſe of *K.* and *Solomon Nathan*, another objection againſt the commitment was, that they commit him, becauſe upon his examination he had *notoriouſly prevaricated*; this being too looſe an expreſſion, for he might prevaricate, and yet give a full anſwer at laſt. And by the court; Where theſe ſpecial authorities are given, the words of the act ought to be purſued. *Str.* 880.

The commiſſioners may by warrant commit him] *H.* 1 *G.* 3. *K.* and *Perrot.* The defendant being brought up by *habeas corpus*, appeared upon the return to have been committed, "until ſuch time as he ſhall "ſubmit himſelf to the ſaid commiſſioners or the major part of them, "and full anſwer make to their ſatisfaction, to the queſtion ſo put by "them to him as aforeſaid." Which queſtion was ſpecified in the warrant to have been, that ſince he did admit there was a deficiency of 13,513*l.*, he ſhould give a true and particular account what was become of it, and how he had diſpoſed thereof. His anſwer was, that * on goods ſold *166 the laſt year he had loſt upwards of 2000*l.* that by mournings he had loſt upwards of 1000*l.* and that for 9 or ten years (he was ſorry to ſay it) he had been extremely extravagant, and ſpent large ſums of money. Which anſwer not being ſatisfactory to the commiſſioners, they committed him as aforeſaid. And now the court, judging the anſwer to be very inſufficient and unſatisfactory, ordered him to be remanded. Afterwards, he was brought up again, and it appeared that he had given a further anſwer, and particularized a woman upon

on whom he had ſpent 5000l. from December 1758 to December 1759, and particularized the times of ſending and giving it to her: but that no other perſon was privy to this, and that the woman (whoſe name was *Sarah Powell*, otherwiſe *Taylor*,) is dead, as he has heard: with ſeveral other improbable circumſtances. It was urged, that now having given a full anſwer, he ought to be diſcharged; that it is not material, in the preſent reſpect, whether his anſwer be true or falſe, or whether his conduct was prudent or imprudent; and if he be not now diſcharged, he muſt be impriſoned for life. But the court ſtill held the anſwer to be incompleat and unſatisfactory, and again ordered him to be remanded. [And this man was afterwards convicted and executed, for concealing his effects.] *Burrow, Mansfield*, 1122, 1215.

Till he ſhall ſubmit to them, and full anſwer make] In the aforeſaid caſe of *Solomon Nathan*, the commitment was, *until he ſhall make a full and true diſcloſure and diſcovery of his eſtate and effects, or be otherwiſe delivered by due courſe of law.* And by the court; This commitment not purſuing the words of the ſtatute, the priſoner muſt be diſcharged. *Str.* 880.

M. 8 *W. Bracy*'s caſe. A commitment *until he ſhould conform himſelf to their authority*, was adjudged ill, becauſe too general, ſince they have authority in other matters beſides that: and it is beſt in the like caſes, ſtrictly to purſue the ſtatute. *L. Raym.* 100.

Another commitment *till diſcharged by due courſe of law*, adjudged ill for the ſame reaſon. *id.* 851.

But if on an *habeas corpus* there appear inſufficiency in the warrant of commitment, the judge nevertheleſs ſhall commit him to the ſame priſon, to remain as aforeſaid, unleſs it be made appear that he hath fully anſwered all lawful queſtions, or unleſs it appear that he had ſufficient reaſon for not ſigning. 5 *G.* 2. *c.* 30. *ſ.* 18.

* 167 And if the gaoler ſhall ſuffer him to eſcape, or to go without the walls or doors of the priſon; he ſhall, on * conviction by indictment or information, forfeit 500l. to the creditors. *id.*

Alſo, the gaoler ſhall, on requeſt of any creditor who ſhall have proved his debt, and producing a certificate thereof under the hands of the commiſſioners, produce and ſhew him to ſuch creditor; on pain of 100l. to the creditors, by action of debt. *id. ſ.* 19.

Bankrupt not ſurrendring and conforming, felony.

20. And by the ſaid ſtatute it is enacted, that if he ſhall not within the ſaid time ſurrender himſelf to the commiſſioners, and ſign ſuch ſurrender, and alſo ſubmit to be examined from time to time on oath, and in all things conform to the ſtatutes concerning bankrupts, and alſo on his examination fully diſcover all his eſtate, and how diſpoſed of, except what hath been *bona fide* diſpoſed of in the way of his trade and dealings, and except what hath been laid out in the ordinary expence of his family, and alſo deliver up to them all his effects (except the neceſſary wearing apparel of himſelf, and wife, and children): then in caſe of any default and wilful omiſſion in not ſurrendering and ſubmitting to be examined, or in caſe he ſhall remove, conceal, or embezzle any part of his eſtate to the value of 20l. or any books of account, or writings relating

relating thereto, with intent to defraud his creditors, and be thereof convicted by indictment or information, he ſhall be guilty of felony without benefit of clergy, and his eſtate ſhall be divided among his creditors. 5 *G.* 2. *c.* 30. *ſ.* 1.

Other perſons concealing the bankrupt's effects.

21. And every perſon who ſhall accept any truſt, or conceal any eſtate of the bankrupt, and ſhall not in forty-two days after iſſuing the commiſſion, and notice thereof in the Gazette, diſcover the ſame in writing to one or more commiſſioners or aſſignees, and ſubmit himſelf to be examined; ſhall forfeit to the creditors 100l. and double value of the eſtate concealed, by action of debt with full coſts. 5 *G.* 2. *c.* 30. *ſ.* 21.

Bankrupt's wife may be examined.

22. Alſo the commiſſioners may examine on oath the bankrupt's wife, like as other perſons. 21 *J. c.* 19. *ſ.* 5, 6.

And every other perſon.

23. As alſo they may examine in like manner every other perſon duly ſummoned before, or preſent at their meeting, touching the perſon, trade, dealings, eſtate, and effects of the bankrupt, and any acts of bankruptcy by him committed; and may take down in writing the anſwers to verbal examinations, which the party ſhall ſign: And if any of them ſhall refuſe to anſwer, or not anſwer fully all lawful queſtions, or refuſe to ſign the ſame, the commiſſioners may by warrant commit him to priſon * without bail, till he ſhall ſubmit to them, and full anſwer make, and ſign the ſame; in like manner as is ſaid before in ſection the 19th concerning the bankrupt himſelf. 5 *G.* 2. *c.* 30. *ſ.* 16, 17, 18, 19. *168

Bankrupt's eſtate to be diſpoſed of by ſale, or otherwiſe.

24. The ſaid commiſſioners ſhall have power by their diſcretions to take ſuch order with the lands of ſuch bankrupt; as well copy or cuſtomary hold as freehold, which he had in his own right before he became a bankrupt; or which he purchaſed jointly with his wife or child to the only uſe of ſuch bankrupt, or for ſuch uſe or intereſt as he may lawfully part with; or with any perſon of truſt to any ſecret uſe of ſuch bankrupt; and alſo with all his money, goods, chattels, wares, merchandizes, and debts; and cauſe all the ſame to be ſearched and appraiſed to the beſt value they may; and the ſame to be ſold by deed indented, and inrolled in a court of record; or otherwiſe ordered for payment of the creditors. 13 *El. c.* 7. *ſ.* 2.

Bankrupt's future eſtate.

25. And if any lands or goods ſhall deſcend or come to the bankrupt afterwards, before the debts be fully paid; the ſame ſhall be diſpoſed of in like manner. 13 *El. c.* 7. *ſ.* 11.

Lands ſold bona fide.

26. But this ſhall not extend to lands aſſured by ſuch perſon before he becomes bankrupt, provided the aſſurance be made *bona fide*, and not to his own uſe only, or of his heirs; and that the party to whoſe uſe they are aſſured, be not privy to the fraudulent purpoſe of the bankrupt to deceive his creditors. 13 *El. c.* 7. *ſ.* 12.

27. Alſo

Eſtate tail.

27. Alſo the commiſſioners may by deed indented, and inrolled at *Weſtminſter* in ſix months, ſell the bankrupt's eſtate in tail, whereof no reverſion or remainder is in the king or of the king's gift; which ſale ſhall be good againſt all perſons, whom the bankrupt by common recovery, or otherwiſe, might cut off. 21 *J. c.* 19. *ſ.* 12.

Eſtate mortgaged.

28. Alſo, if the bankrupt hath conveyed any eſtate, on condition, or power of redemption, at a day to come, by payment of money, or otherwiſe; the commiſſioners before the time of the performance of ſuch condition may appoint under their hands and ſeals any perſon to make tender or payment of money, or other performance, as fully as the bankrupt might have done; and may diſpoſe of the eſtate redeemed for the uſe of the creditors, as fully as any other eſtate of the bankrupt. 21 *J. c.* 19. *ſ.* 13.

Cuſtomary lands.

29. Perſons purchaſing copyhold or cuſtomary lands ſhall pay a fine to the lord of the manor, who ſhall hereupon admit them. 13 *El. c.* 7. *ſ.* 4.

In order to ſave the expence of two fines, it was recommended by
* 169 the lord chancellor Hardwicke in ſuch * caſe, to leave out the copyhold eſtate in the aſſignment; and then the commiſſioners, when they can meet with a purchaſer, may convey to him in the firſt inſtance. 1 *Atk.* 96.

Effects which he hath as executor.

30. Effects which a bankrupt hath as executor only ſhall not be applied to the uſe of the creditors; but ſhall go according to the direction of the teſtator. 1 *Atk.* 101.

Commiſſioners may break open doors.

31. Commiſſioners and others by warrant under their hands and ſeals, may break open the bankrupt's houſes, doors, trunks, and cheſts, where he or any of his goods ſhall be reputed to be, and ſeize upon and order his body and goods as before is ſaid. 21 *J. c.* 19. *ſ.* 8.

Bankrupt fraudulently conveying.

32. If the bankrupt ſhall convey to any of his children, or other perſon, any lands or goods, or transfer his debts in other mens names, except the ſame be conveyed or transferred on marriage of any of his children, or for ſome valuable conſideration; the ſame may be diſpoſed of in like manner. 1 *J. c.* 15. *ſ.* 5.

And if the bankrupt ſhall on his examination be found fraudulently to have conveyed his lands, goods, or eſtate, to the value of 20*l.* to defraud his creditors, and ſhall not diſcover the ſame, and (if it lie in his power) deliver the ſame to the commiſſioners: or if he cannot make it appear to the commiſſioners, that he hath ſuſtained ſome caſual loſs whereby he is diſabled to pay what he oweth; he ſhall, on conviction upon indictment at the aſſizes or ſeſſions be ſet in the pillory in ſome public place for two hours, and have one of his ears nailed to the pillory, and cut off. 21 *J. c.* 19. *ſ.* 7.

33. And

33. And if any bankrupt, after iſſuing the commiſſion, ſhall compound with the perſon ſuing out the ſame, for more than his proportion with the reſt of the creditors; ſuch commiſſion may be ſuperſeded, and the lord chancellor may award to any creditor petitioning another commiſſion, and the perſon ſo compounding ſhall loſe his whole debt, and deliver up to the new commiſſioners all he ſhall have ſo received for the uſe of the other creditors. 5 *G.* 2. *c.* 30. *ſ.* 24. *Bankrupt compounding with the perſon ſuing out the commiſſion.*

34. If a debtor to a bankrupt pays him voluntarily, he muſt pay it over again, but it is otherwiſe if he pays him by compulſion of law. *Read.* Bankr. *Debtor paying to a bankrupt.*

35. But no real creditor of the bankrupt ſhall be liable to refund to the aſſignees, any money which before the ſuing forth the commiſſion was in courſe of trade received by him of the bankrupt before he had knowledge of the perſon's becoming a bankrupt, or being inſolvent. 19 *G.* 2. *c.* 19. *ſ.* 1. *Money received of a bankrupt.*

* 36. And no purchaſer for valuable conſideration ſhall be impeached, unleſs the commiſſion be ſued out in five years after the perſon ſhall become a bankrupt. 21 *J.* *c.* 19. *ſ.* 14. *Purchaſer not to be impeached after five years.* * 170

37. If the bankrupt, at the time he ſhall become bankrupt, ſhall by conſent of the true owner, have in his poſſeſſion and diſpoſition any goods whereof he ſhall be reputed owner, and take upon him the ſale or diſpoſition thereof as owner; the commiſſioners may diſpoſe of the ſame, as fully as any other part of the bankrupt's eſtate. 21 *J.* *c.* 19. *ſ.* 11. *Bankrupts conveying their goods, and keeping poſſeſſion.*

38. If any eſtate of the bankrupt be extended after he is become a bankrupt, by any perſon under pretence of his being an accountant or indebted to the king; the commiſſioners may examine upon oath, whether the ſaid debt were due to ſuch debtor or accountant, upon any contract originally made between ſuch accountant and the bankrupt; and if it was made with any other perſon than the ſaid accountant, or for the uſe of any other perſon, the commiſſioners proceedings ſhall be available againſt the ſaid extent. 21 *J.* *c.* 19. *ſ.* 10. *Debt due to the king.*

Otherwiſe, an extent of the crown is available againſt a commiſſion of bankruptcy; the crown not being within the ſtatutes of bankrupts. 1 *Atk.* 262.

39. The commiſſioners or aſſignees may ſtate accounts between the bankrupt and his debtors or creditors, and ſet one debt againſt another, and the balance only ſhall be paid on either ſide. 5 *G.* 2. *c.* 30. *ſ.* 28. *Commiſſioners may ſtate accounts.*

40. Alſo the aſſignees with conſent of the major part in value of the creditors preſent at a meeting purſuant to notice to be given in the Gazette, may ſubmit diſputes relating to the bankrupt's eſtate to *May refer to arbitration and compound.*

 arbitration;

arbitration; and may compound for debts owing to the bankrupt, 5 G. 2. c. 30. ſ. 34, 35.

Joint trader.

41. Creditors of a joint eſtate, where there are no ſeparate creditors, may exhauſt both the joint and ſeparate eſtate; but where there are both joint and ſeparate creditors, the joint creditors (as they give credit to the joint eſtate) ſhall have firſt their demand on the joint eſtate, and the ſeparate creditors (as they give credit to the ſeparate eſtate) ſhall have firſt their demand on the ſeparate eſtate: But if there be a ſurplus of the ſeparate eſtate, the joint creditors are entitled to it; for a bankrupt has no right to any thing, till they are fully ſatisfied. But for the ſaving of expences, where there is a joint commiſſion depending, it ſeemeth beſt for the ſeparate creditors not to take out a
*171 ſeparate commiſſion, but to apply * to the court for an order to be admitted to come in and prove their debts under the joint commiſſion. 1 *Atk.* 67, 138, 227.

Reward for diſcovering.

42. Every perſon who ſhall, after the time of ſurrender, voluntarily make diſcovery to the commiſſioners or aſſignees, of any part of the bankrupt's eſtate, not before come to the knowledge of the aſſignees, ſhall have 5*l. per cent.* and ſuch farther reward as the aſſignees and the major part of the creditors in value, preſent at any meeting, ſhall think fit. 5 G. 2. c. 30. ſ. 20.

Perſons having ſecurity, to have only their ſhare.

43. Creditors having ſecurity by judgment, ſtatute, recognizance, ſpecialty with penalty or without, or other ſecurity, or having no ſecurity, or having made attachments in *London*, or elſewhere by any cuſtom of the goods of ſuch bankrupt, whereof there is no execution or extent ſerved and executed upon the lands, goods, or eſtate of ſuch bankrupt before he ſhall become bankrupt, ſhall not be relieved for more than a rateable part with the other creditors, notwithſtanding any penalty or greater ſum contained in ſuch ſecurity. 21 *J.* c. 19. ſ. 9.

Securities for money not become due.

44. Perſons taking ſecurities, payable at a future day, for goods delivered to perſons who ſhall become bankrupts before the time of payment, ſhall be admitted to prove their ſecurities, and receive their proportion, deducting intereſt from the time of payment to the time it would have become due. 7 G. c. 31. ſ. 1, 2.

But where the payment depends upon a future contingency, as if a ſecurity be made to pay to the wife ſo much in caſe ſhe ſurvives her huſband, here ſhe cannot come in amongſt the creditors, becauſe it is entirely uncertain whether ſhe ſhall ever have any demand or not. And in caſe of the event happening afterwards, ſhe can only come upon the bankrupt's future eſtate. 1 *Barnard.* 59.

Bottom-ree inſurance.

45. The obligee in any bottom-ree, or reſpondentia bond, and the aſſured in a policy of inſurance, ſhall be admitted to claim; and after the loſs or contingency, to prove the debt thereon, in like manner as if the ſame had happened before iſſuing the commiſſion. 19 G. 2. c. 32. ſ. 2.

The

46. The mortgagee may chuſe whether he will come in as a creditor. *Read.* Bankr. *Mortgagee.*

47. A landlord may diſtrain for his rent upon a bankrupt's goods, either before or after the aſſignment; but if he neglects to do it, and ſuffers them to be removed, he can only come in upon an average with the reſt of the creditors. But if the goods remain on the premiſſes, he may diſtrain them, even after the meſſenger is in poſſeſſion, * or after ſale by the aſſignees. And he is not reſtricted to one year only, as in the caſe of executions, but may diſtrain for his whole arrear. 1 *Atk.* 102, 3. *Landlord for his rent.* * 172

48. An apprentice, for money to be refunded given with him on his binding, ſhall come in only amongſt the reſt of the creditors *pro rata.* 1 Atk. 149. *Apprentice.*

49. Where debts carry intereſt, the ſame ſhall be continued down to the date of the commiſſion: but note-creditors have no right to prove intereſt upon them, unleſs it is expreſſed in the body of the notes. Even at law, where notes are for value received, and intereſt is not expreſſed, the jury do not give the plaintiff, in an action upon the notes, intereſt for them, but by way of damages only: and commiſſioners of bankrupts cannot award damages. 1 *Atk.* 151, 259. *Intereſt how to be computed.*

50. Aſſignees ſhall not be anſwerable for loſſes occaſioned by their own neceſſary acts; but if an aſſignee truſts a perſon with the payment of money, who fails, and the money is loſt, ſuch aſſignee ſhall be anſwerable over to the creditors, unleſs he conſulted the body of the creditors in the appointment of ſuch agent. 1 *Atk.* 87. *Aſſignees how far anſwerable for loſſes.*

51. An aſſignee, who is an officer of the court, and an officer of the commiſſion, ſhall not be allowed to ſtop a perſon's ſhare in the dividend, on account of his own private debt, which is owing to him from that perſon: he hath his remedy at law, and ought not to intermix his own private affairs with the commiſſion, to which he is only a truſtee. 1 *Atk.* 90. *Aſſignee cannot retain for money due to himſelf.*

52. If any perſon ſhall ſwear that any ſum is due to him from the bankrupt, which is not due or more than is due; he ſhall ſuffer as in caſes of perjury, and moreover forfeit double to the creditors. 5 *G.* 2. *c.* 30. *ſ.* 29. *Swearing to a falſe debt.*

53. The aſſignees ſhall keep books of account of all ſums and effects received; which every creditor who hath proved his debt, may inſpect at all ſeaſonable times. 5 *G.* 2. *c.* 30. *ſ.* 26. *Aſſignees to keep books.*

54. The aſſignees ſhall, after four months, and within twelve months after iſſuing the commiſſion, cauſe at leaſt twenty-one days notice to be given in the Gazette, of the time and place the commiſſioners and aſſignees intend to meet to make a dividend; at which time, the creditors who have not before proved their debts may prove them; and the aſſignees ſhall produce fair accounts, and be ſworn to them before the commiſſioners, if required by the creditors; and they ſhall be allowed therein all reaſonable expences. And the commiſſioners may then order, under their hands, a diſtribution (to *First dividend.*

*173 every creditor a portion * ratelike, according to the quantity of his debts, 13 *El. c. 7. ſ. 2.*); which order ſhall contain the time and place of making it, and the total of the debts proved, and of the money in the hands of the aſſignees, and how much in the pound ſhall be then diſtributed; one part of which order ſhall be filed among the proceedings under the commiſſion, and each of the aſſignees ſhall have a duplicate thereof. And the aſſignees ſhall take receipts for the ſame, in a book to be kept for that purpoſe. 5 *G. 2. c. 30. ſ. 33.*

Allowance to the bankrupt.

55. The bankrupt ſurrendring and conforming, ſhall be allowed 5l. *per cent.* if after ſuch allowance, the neat produce of his eſtate will pay 10s. in the pound; ſo as the ſaid 5l. *per cent.* amount not to above 200l.

And if the neat produce will pay 12s. 6d. in the pound: he ſhall be allowed 7l. 10s. *per cent.* ſo as it amount not to above 250l.

And if it will pay 15s. in the pound, he ſhall be allowed 10l. *per cent.* ſo as it exceed not above 300l.

If the neat produce will not pay 10s. in the pound, the bankrupt ſhall be allowed ſo much as the aſſignees and commiſſioners ſhall think fit, not exceeding 3l. per cent. 5 *G. 2. c. 30. ſ. 7, 8.*

But the ſame ſhall not be paid to the bankrupt till a final dividend ſhall be made; becauſe until that time, creditors may ſtill come in to prove their debts. 1 *Atk.* 208.

Certificate and allowance thereof.

56. But no diſcovery on oath ſhall intitle the bankrupt to the ſaid allowance, unleſs the commiſſioners ſhall, under their hands and ſeals, certify to the lord chancellor, that he hath made a full diſcovery of his eſtate, and in all things conformed himſelf; and that there doth not appear to them any reaſon to doubt of the truth of ſuch diſcovery, or that the ſame is not a full diſcovery; and unleſs four parts in five in number and value of the creditors, who ſhall be creditors for not leſs than 20l. and who have proved their debts, or ſome perſon by them authoriſed thereto, ſhall ſign ſuch certificate, and teſtify their conſent to ſuch allowance and certificate, and to the bankrupt's diſcharge, to be alſo certified by the commiſſioners; but the commiſſioners ſhall not certify the ſame, till they have proof by affidavit of ſuch creditors, or of the perſon by them reſpectively authoriſed, ſigning the ſaid certificate, and of the power by which any perſon is ſo authoriſed (and the letter of attorney of a creditor reſiding in foreign parts, atteſted by a notary public, ſhall be ſufficient evidence in ſuch caſe of ſuch power, 24 *G. 2. c. 57. ſ. 10.*) which ſaid affidavit, together with ſuch power
*174 to ſign, ſhall be * laid before the lord chancellor with the certificate in order for allowing the ſame;—and unleſs the bankrupt make oath, that the certificate and conſent of the creditors were obtained fairly and without fraud; and unleſs the certificate ſhall, after ſuch oath, be allowed and confirmed by the lord chancellor, or two of the judges to whom he ſhall refer it: and any of the creditors ſhall be allowed to be heard againſt making the certificate, and againſt the confirmation of it: nor ſhall any commiſſioner ſign the certificate, till after four parts in five in number and value of the creditors ſhall have ſigned it. 5 *G. 2. c. 30. ſ. 10.*

And

And every ſecurity given to the uſe of any creditor, to induce him to ſign ſuch allowance or certificate, ſhall be void. *id. ſ.* 11.

Moreover, no bankrupt ſhall be intitled to ſuch allowance, who hath upon marriage of any child given above 100l. unleſs he prove by his books, or upon his oath, that he had remaining at the time ſufficient to pay his debts; or who hath loſt in one day the value of 5l. or in the whole the value of 100l. in 12 months next before his becoming bankrupt, at cards, dice, tables, tennis, bowls, billiards, ſhovelboard, cock-fighting, horſe-races, dog-matches, foot-races, or other paſtime or game, or in bearing a part in the ſtakes, or by betting; or hath within one year before he became a bankrupt loſt 100l. by contracts for the ſtock of any company, or publick funds, where the contract was not to be performed within a week, or where the ſtock was not actually transferred. 5 *G.* 2. *c.* 30. *ſ.* 12.

And moreover, by 24 *G.* 2. *c.* 57. When any perſon ſhall fraudulently ſwear, before the major part of the commiſſioners, or by affidavit exhibited to them, that a ſum of money is due to him from the bankrupt, which ſhall in fact not be really owing; and ſhall, in reſpect of ſuch fictitious debt, ſign the certificate for ſuch bankrupt's diſcharge; in ſuch caſe, unleſs the bankrupt ſhall, before the major part of the commiſſioners have ſigned the certificate, by writing ſigned by him and delivered to one or more of the commiſſioners or aſſignees, diſcloſe the fraud, and object to the reality of ſuch debt, the certificate ſhall be void, and the bankrupt ſhall not be intitled to his diſcharge or allowance. *ſ.* 9.

By 14 *G.* 3. *c.* 77. *ſ.* 59. and 16 *G.* 3. *c.* 38. *ſ.* 69. Bankrupts who have conformed to all the laws relating to them, but who cannot obtain their diſcharge, may petition the court of chancery.

* By 18 *G.* 3. *c.* 52. *ſ.* 76. The lord chancellor is impowered to allow certificates to bankrupts who have conformed, though not ſigned by four fifths of their creditors. * 175

57. The bankrupt, after allowance of the certificate, ſhall attend on notice in writing from the aſſignees, to ſettle accounts, and ſhall have 2s. 6d. a day allowed for attendance; and if he ſhall neglect or refuſe, he ſhall, on oath made by the aſſignees before the commiſſioners, be apprehended and committed to cloſe gaol, by warrant of the ſaid commiſſioners, till he conform. 5 *G.* 2. *c.* 30. *ſ.* 36. *Bankrupt's duty after allowance.*

58. To prevent expences, no money ſhall be paid out of the effects for eating or drinking of the commiſſioners, or of any other perſon; nor ſhall the commiſſioners have above 20s. each for each meeting; nor any ſchedule be annexed to the deed of aſſignment: Commiſſioners acting contrary hereto, ſhall be diſabled for ever to act as ſuch. 5 *G.* 2. *c.* 30. *ſ.* 42. *Commiſſioners pay.*

59. If by the death of commiſſioners, or otherwiſe, it be neceſſary to renew the commiſſion, half fees only ſhall be paid. 5 *G.* 2. *c.* 30. *ſ.* 45. *Half fees on renewing the commiſſion.*

60. All

Attorney's bill. 60. All bill of fees or disbursements demanded by any solicitor, clerk, or attorney, shall be settled and certified by a master in chancery, who shall have for the same 20s. 5 *G.* 2. *c.* 30. *s.* 46.

Bankrupt dying. 61. Bankrupt dying before distribution, shall not hinder the distribution. 1 *J.* *c.* 15. *s.* 17.

And if the certificate be allowed in the life time of the bankrupt, it is good, tho' it be not confirmed by the lord chancellor till after his death: for the operative force of it arises from the consent of the creditors; and when confirmed, it hath its effect from the beginning. 1 *Atk.* 77.

And the allowance to the bankrupt, being a vested interest, shall go to his executor. 1 *Atk.* 208.

Second dividend. 62. In 18 months after issuing the commission, the assignees shall make a second dividend, and shall cause notice to be inserted in the Gazette of the time and place the commissioners intend to meet to make a second distribution, and for the creditors who have not proved their debts to come and prove them: And at such meeting, the assignees shall produce their account on oath, and what is in their hands shall by order of the commissioners be forthwith divided. Which second dividend shall be final, unless a suit in law or equity be depending, or part of the estate standing out that cannot have been disposed of, or that the major part of the creditors shall
* 176 not have * agreed to be sold, or unless some other or future estate of the bankrupt shall come to the assignees; which they shall, as soon as may be, convert into money, and in two months distribute the same in like manner. 5 *G.* 2. *c.* 30. *s.* 37.

But no suit in equity shall be commenced by the assignees, without consent of the major part in value of the creditors, who shall be present at a meeting of the creditors pursuant to notice in the Gazette. *id. s.* 38.

Bankrupt's discharge. 63. If the bankrupt shall be taken in execution, or detained in prison, for debt owing before his bankruptcy, by reason that judgment was obtained before the certificate was allowed and confirmed; any judge of the court, on producing the certificate, may order him to be discharged without fee. 5 *G.* 2. *c.* 30. *s.* 13.

And if the bankrupt's estate will pay 15s. in the pound, he shall be discharged from all the debts by him owing at the time he became bankrupt: And if he shall be arrested or prosecuted for any debt due before that time, he shall be discharged on common bail, and may plead in general, that the cause of action did accrue before he became bankrupt, and may give this act, and the special matter in evidence; and the certificate of his conforming, and allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining the certificate; and a verdict shall pass for the defendant, unless the plaintiff can prove that the certificate was obtained fraudulently, or can make appear a concealment by the bankrupt to the value of 20*l.* And if
the

the plaintiff is caſt, the defendant ſhall have full coſts. 5 G. 2. c. 30. ſ. 7.

But if any commiſſion of bankruptcy ſhall iſſue againſt any perſon who ſhall have been diſcharged by this act, or ſhall have compounded with his creditors, or delivered to them his eſtate, and been releaſed by them, or been diſcharged by an act of inſolvency, then the body only of ſuch perſon conforming ſhall be free from arreſt and impriſonment, but his future eſtate ſhall remain liable to his creditors (his tools of trade, neceſſary houſehold goods and furniture, and neceſſary wearing apparel of himſelf and wife and children only excepted), unleſs the eſtate of ſuch perſon ſhall produce clear of all charges 15s. in the pound. *id.* ſ. 9.

Sureties not diſcharged.

64. But the bankrupt's diſcharge, and allowance of his certificate, will not preclude the creditors from proceeding againſt his ſureties. 1 *Atk.* 83.

Commiſſioners to account and pay the overplus. *177

*65. The commiſſioners ſhall, on lawful requeſt of the bankrupt, declare how they have beſtowed his lands and goods, and pay to him the overplus, if any there be. 13 *El.* c. 7. ſ. 4.

Proceedings to be entred of record.

66. On petition to the lord chancellor, he may order the proceedings to be entred of record, to be at any time ſearched and produced as evidence. 5 G. 2. c. 30. ſ. 41.

Remedy on commiſſioner being ſued.

67. Commiſſioner ſued for any thing done on the ſtatute of 13 *El.* and 1 *J.* may plead the general iſſue; and if he recovers, ſhall have his coſts. 1 *J.* c. 13. ſ. 16. But there is no proviſion for any thing done by them, or by the aſſignees, on any of the ſubſequent ſtatutes.

King's death not to abate the commiſſion.

68. The commiſſion ſhall not abate by the death of the king. 5 G. 2. c. 30. ſ. 45.

Note; the act of 5 G. 2. c. 30. ſo often mentioned above, is but temporary, and by the 26 G. 3. c. 80. is of force till the 29th *Sept.* 1788.—And from thence till the end of the next ſeſſion of parliament.

A Warrant to apprehend a bankrupt.

Weſtmorland. { To ———

WHEREAS a certificate under the hands and ſeals of ——— hath this day been produced before me ——— ſetting forth that a commiſſion of bankruptcy is iſſued againſt ——— and that the ſaid ——— is proved before them the ſaid ——— being the major part of the commiſſioners authorized in the ſaid commiſſion, to be a bankrupt. And whereas application hath been made to me by ——— by order of the ſaid commiſſioners, for the apprehending the ſaid ——— Theſe are therefore to require you, on ſight hereof, to take and apprehend the ſaid ——— and bring him before me or ſome other of his majeſty's juſtices

justices of the peace for the said county, to be proceeded against according to law. Given under my hand and seal this ——— day of, &c.

*178 * B. Commitment thereon.

Westmorland. { To the keeper of the common gaol at ——— in the said county, *J. P.* esquire one of his majesty's justices of the peace for the said county sendeth greeting:

I Send to you herewith ——— being duly certified to be a bankrupt, requiring you to keep him in the said gaol until he shall be discharged according to law. Given ———.

By 28 *G.* 3. *c.* 24. *s.* 2. the 5 *G.* 2. *c.* 30. for preventing the committing of frauds by bankrupts, being but temporary, is further continued to 1st *June* 1793, and from thence to the end of the then next session of parliament.

BARON COURT.

THE *court baron* is a court which every lord of a manor (anciently called a *baron*) hath within the precinct of that manor. The business thereof is, to inquire of matters concerning the lord and tenant in their *civil* capacity only, as of the death of tenants since the last court, of alienations, surrenders, incroachments, trespasses, escheats, forfeitures, and such like. But with this court is frequently held, by grant or prescription, a *court leet*; the jurisdiction whereof extendeth to all *criminal* matters within the precinct, for the preservation of the king's peace. For which see the title *Leet*.

BARRATRY.

I. What it is.
II. How punished.

I. What it is.

THIS word *barratry* we have received either from the *Danes* or *Normans*, or both: for *barratta* in the *Danish*, and *baret* in the *Norman*, do equally signify a quarrel or contention.

And a *barrator*, in legal acceptation, doth signify a *common mover, exciter, or maintainer of suits or quarrels, either in courts, or in the country.* 1 Inst. 368. 1 Haw. 243.

*179 * *A common mover*] It seems clear that no one can be a barrator in respect of one act only; for every indictment for such crime must

must charge the defendant with being a *common barrator*. 1 Haw. 243, 4.

Mover, exciter, or maintainer] Yet it ſeemeth, that an attorney is in no danger of being judged guilty of an act of barratry, in reſpect of his maintaining another in a groundleſs action, to the commencing whereof he was no way privy. 1 *Haw.* 243.

Alſo it hath been holden, that a man ſhall not be adjudged a barrator, in reſpect of any number of falſe actions brought by him in his own right; for in ſuch caſes he is liable to coſts. 1 *Haw.* 243.

In courts] Either courts of record; or not of record, as in the county, hundred, or other inferior courts. 1 *Inſt.* 368.

Or in the country] In three manners: 1. In diſturbance of the peace. 2. In taking or keeping of poſſeſſion of lands in controverſy, not only by force, but alſo by ſubtilty and deceit, and moſt commonly in ſuppreſſion of truth and right. 3. By falſe inventions, and ſowing of calumniations, rumours, and reports, whereby diſcord and diſquiet may grow between neighbours. 1 *Inſt.* 368.

II. How puniſhed.

By the ſtatute of 34 *Ed.* 3. *c.* 1. *The Juſtices of the peace ſhall have power to reſtrain all barrators, and to purſue, arreſt, take and chaſtiſe them, according to their treſpaſs, or offence.*

And altho' this ſtatute doth not create this offence, but ſuppoſes it at common law, and only appoints the puniſhment, yet an indictment of barratry, concluding *againſt the form of the ſtatute*, is holden to be good, and agreeable to many precedents. *Cro. Eliz.* 148. 1 *Haw.* 244.

But it hath been reſolved, that ſuch indictment is not good, without alſo concluding *againſt the peace*; for this is an eſſential part of it, as being an offence by the common law. 1 *Haw.* 244.

And it hath been holden, that an indictment of this kind may be good, without alledging the offence at any certain *place*; becauſe, from the nature of the thing, conſiſting of the repetition of ſeveral acts, it muſt be intended to have happened in ſeveral places; for which cauſe it is ſaid, that a trial ought to be by a jury from the body of the county. 1 *Haw.* 244.

* Which caſe, and that of a common ſcold, ſeem to be the only of- * 180
fences for which a general indictment will lie, without ſhewing any of the particular facts in the indictment; for barratry is an offence of a complicated nature, conſiſting in the repetition of divers acts in diſturbance of the peace, and it would be too prolix to enumerate them in the indictment; and therefore experience hath ſettled it to be ſufficient to charge a man generally as a common barrator, and before the time to give the defendant a note of the particular matters which are intended to be proved againſt him; for otherwiſe it will be impoſſible to prepare a defence againſt ſo general and uncertain a charge, which may be proved by ſuch a multiplicity of different inſtances; and therefore the court generally will not ſuffer the proſecution to go on in the trial of the indictment, without ſuch note being given to the defendant. 1 *Haw.* 244. 2 *Haw.* 225, 7.

As to the kind and manner of punishment, it is said, that if the offender be a common person, he shall be fined and imprisoned, and bound to his good behaviour; and if he be of any profession relating to the law, he ought also to be farther punished, by being disabled to practise for the future. 1 *Haw.* 244.

And by the 12 G. c. 29. If any person, who hath been convicted of forgery, perjury, subornation of perjury, or common barratry, shall practise as an attorney or solicitor; he shall be transported for seven years. *s.* 4.

BASTARDS.

Concerning the settlement of bastard children, see title *POOR*.

I. Who shall be deemed a bastard.
II. Securing the reputed father.
III. Bond to indemnify the parish.
IV. Order of filiation and maintenance by the justices.
V. Appeal against the order.
VI. Punishment of the mother and reputed father.
VII. Mother or reputed father running away.
VIII. Murdering a bastard child.
IX. Capacity of a bastard as to inheritance.

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* I. *Who shall be deemed a bastard.*

Meaning of the word bastard.

1. THE word *bastard* seemeth to have been brought unto us by the *Saxons*; and to be compounded of *base*, vile or ignoble, and *start*, or *steort* signifying a rise or original. By the common people in the north (amongst whom is preserved much of the ancient *Saxon*) it is still pronounced *bastart*, denoting a person sprung from a vile or spurious origin; even as an *upstart* is a person suddenly risen from a mean extraction in general.

Bastard born in lawful marriage.

2. Lord *Coke* says, We term all by the name of bastards that are born out of lawful marriage. By the common law, if the husband be within the four seas, that is, within the jurisdiction of the king of *England*, if the wife hath issue, no proof is to be admitted to prove the child a bastard unless the husband hath an apparent *impossibility* of procreation, as if the husband be but eight years old, or under the age of procreation, such issue is bastard, albeit he be born within marriage. But if the issue be born within a month, or a day, after marriage, between parties of full lawful age, the child is legitimate. 1 *Inst.* 244.

M. 6 G. 2. *Lomax* and *Holmden.* In ejectment the question on a trial at bar was, whether the lessor was son and heir of *Caleb Lomax*, esquire, deceased; which depended on the question of his mother's marriage. And that being fully proved, and evidence given of the husband's being frequently at *London*, where the mother lived, so that access must be presumed; the defendants were admitted to give evidence

of his inability from a bad habit of body. But their evidence not going to an *impoſſibility*, but an improbability only; that was not thought ſufficient, and there was a verdict for the plaintiff. *Str.* 940.

And it is ſaid, that formerly if the huſband was within the four ſeas, no proof of *non acceſs* to his wife was admitted, but the child was deemed to be his; but as this notion was built on no rational foundation, it is now entirely departed from; and though the huſband and wife are both in *England*, if there is ſufficient proof that he had no acceſs to her, the child will be a baſtard. And this was determined in the caſe of *Pendrell* and *Pendrell*, *M.* 5 *G.* 2. which was an iſſue out of chancery, to try whether the plaintiff was the heir at law of one *Thomas Penêrell*. It was agreed, that the plaintiff's father and mother were married, and cohabited for ſome months; that * they parted, ſhe ſtaying in *London*, and he going into *Staffordſhire*; that at the end of three years the plaintiff was born. And there being ſome doubt upon the evidence, whether the huſband had not been in *London* within the laſt year, it was ſent to be tried. And the plaintiff reſted at firſt upon the preſumption of law in favour of legitimacy, which was encountered by ſtrong evidence of no acceſs. And it was agreed by court and counſel, on the trial at *Guildhall*, before Lord Ch. J. *Raymond*, that the old doctrine of being within the four ſeas was not to take place, but the jury were at liberty to conſider of the point of acceſs, which they did, and found againſt the plaintiff. And the court of chancery acquieſced in the determination. *Str.* 925. *Andr.* 9. * 182

T. 10 *G.* 2. *K.* and the inhabitants of *Bedall* in *Yorkſhire*. An order was made upon one *Moor*, as the putative father of two baſtards, born of the body of *Elizabeth* the wife of *Richard Sharpleſs*: in which it was ſtated, that for ſeven years before, the huſband had had no acceſs to her, ſhe having never ſeen or heard of him all that time, and not knowing whether he was alive or dead; which the juſtices adjudge to be true, and that *Moor* is the father of them, and order him to provide accordingly. Upon appeal to the ſeſſions, the caſe is ſtated with ſome variation: that in 1728, ſhe was married to *Sharpleſs*, then a ſoldier in *Mullin*'s troop, in a barn by a perſon not in the habit of a clergyman; that there had been no acceſs for ſeven years: but it appearing by a certificate from the commiſſary general's office, and from the evidence of *Simon Clarkſon*, that one *Richard Sharpleſs*, who he was told was formerly in *Mullin*'s troop, was muſtered as a private gentleman in the third troop of horſe guards, from *June* 25, 1733, *to Feb.* 23, 1736, though *Clarkſon* ſaid he could not take upon him to ſwear that it was the ſame *Richard Sharpleſs* pretended to be married as aforeſaid; upon this ſuppoſition of the huſband's being alive, the ſeſſions were of opinion, the children were not baſtards, and reverſed the order of the two juſtices. And now upon debate, the order of ſeſſions was quaſhed, and the order of two juſtices confirmed: for it being ſtated in both orders, that there was no acceſs according to the caſe of *Pendrell* and *Pendrell*, it was immaterial whether the huſband was alive or not. *Str.* 1076.

And, *M.* 10 *W.* *K.* and *Abberton*. The caſe was, a feme covert, during the abſence of her huſband at *Cadiz*, was brought to bed of a baſtard; and her huſband was not in *England* from the time of her

*183 conception, till ſhe was * brought to bed. The queſtion was, whether this child was a baſtard, eſpecially within the words of the ſtatute of the 18 *Eliz.* (hereafter following) which ſaith, *children begotten and born out of lawful matrimony*; which cannot be ſaid of this caſe, the mother being married at the time of the birth of the child: and if ſuch a mother ſhould kill ſuch child, ſhe could not be guilty of murder within the ſtatute of the 21 *J. c.* 27. But by the court; He is a baſtard who is begotten and born of a feme covert, whilſt the huſband is beyond the four ſeas. And in a real action if general baſtardy was pleaded, the biſhop ought to certify ſuch a one a baſtard. And where a man is a baſtard, he is ſuch to all purpoſes, and why not within the 18 *El.* For though the ſtatute of 21 *J.* is a penal law, yet the act of 18 *El.* is a remedial law. L. *Raym.* 395, 396.

How far the wife's oath ſhall be admitted in ſuch caſe.

3. But this non-acceſs of the huſband ought to be proved otherwiſe than upon the wife's oath; as in the following caſe; *M.* 8 *G.* 2. *K.* and *Reading.* The defendant *Reading* was adjudged by an order of baſtardy, to be the putative father of a baſtard child, begotten of the wife of one *Almont* of *Sherborn.* The ſaid woman on the appeal, gave evidence, that the ſaid *Reading* had carnal knowledge of her body in or about *Auguſt* 1732, and ſeveral times ſince; and that her huſband had no acceſs to her from *May* 1731, to the time of her examination in that court, being the 3d of *October* 1733, and that the ſaid *Reading* was the father of the ſaid child. And the queſtion on removal of the ſame into the king's bench was, whether the wife in this caſe ſhould be admitted as an evidence for or againſt her huſband, and to baſtardize her own child. And the whole court were of opinion, that the wife could be a witneſs to no other fact but that of incontinence, and that this ſhe muſt be admitted to be witneſs to from the neceſſity of the thing; but not to the abſence of her huſband, which might properly be proved by other witneſſes; and likened it to the caſe of hue and cry, where the perſon robbed ſhall be admitted a witneſs of the fact of robbery, but not to prove any other matter relating thereto, as in what hundred the place was, and the like, becauſe that may be proved by others. 2 *Seſſ. Ca.* 175.

And in the caſe of *K.* and *Rooke*, *M.* 26 *G.* 2. The order of the two juſtices ſtates; it appears to us by examination of *Dorothy* the wife of the reverend Mr. *Henry Bird*, that ſhe lived ſeparate from her huſband from *Michaelmas* 1750, to *February* 1752; and that ſhe has not in all that time ſeen or been with him, he being a priſoner in *York* caſtle:

*184 That *John Rooke* had carnal knowledge of * her body on the 30th of *January* 1750, and got her with child of the baſtard. Exception was taken, that the wife in this caſe was an incompetent witneſs. By *Lee* Ch. J. and the court: How far the evidence of the wife is to be admitted upon orders of baſtardy, is now ſettled in the caſe of *K.* and *Reading*; where the wife appeared upon the order to be the only witneſs to charge the putative father: upon this, the order was quaſhed; and the reaſon given by the court was, that the wife might be admitted to prove the act of adultery *ex neceſſitate*, for of that there could be no other evidence; but not to prove other facts, of which there may be witneſſes. The caſe being ſimilar, muſt be determined upon the authority of that

that caſe. The wife's examination alone does not make the order bad, but the facts to which ſhe is examined. The neceſſity of the thing excepts her, as to the fact of adultery, out of the general rule; but not as to the fact of no acceſs for that may be proved by particular circumſtances examinable by the juſtices below. But upon this order ſhe appears to be the only evidence: and her declarations are not admiſſible to baſtardize her iſſue. And the order was quaſhed. 1 *Wilſon*, 340.

But in the caſe of *K.* and *Bedall* abovementioned, The order reciting, that on the examination of the mother, *and on other proof*, it appeared that her huſband had no acceſs to her, was held to be good; for there the woman's oath is not ſet forth as the only evidence, but *other proof*, which muſt be intended legal proof. *Andr.* 8.

4. *M.* 5 *An.* St. *George's* and St. *Margaret's Weſtminſter.* Where a woman is ſeparated from her huſband by a divorce *a menſa & thoro*, the children ſhe has during the ſeparation are baſtards; for a due obedience to the ſentence ſhall be intended, unleſs the contrary be ſhewed: but if a huſband and wife, without ſentence, do part and live ſeparate, the children ſhall be taken to be legitimate, and ſo deemed till the contrary be proved, for acceſs ſhall be intended. But if a ſpecial verdict find the man had no acceſs, it is a baſtard; and ſo was the opinion of lord *Hale*, in the caſe of *Dickins and Collins.* 1 Salk. 123. *Child born during a divorce.*

5. The law hath appointed no exact certain time, for the birth of legitimate iſſue, by the widow after the death of her huſband. 1 *Danv.* 726. *Widow having a child after her huſband's death.*

M. 7. *J. Alſop* and *Bowtrell.* The queſtion was, whether, the woman being delivered of a child forty weeks and nine days after the death of her huſband, ſuch child ſhould be deemed a baſtard. And it was proved, that her * deceaſed huſband's father did much abuſe her, and cauſed her to lie in the ſtreets; and three phyſicians (two of them being doctors of phyſick) made oath, that the child came in time convenient to be the child of the party who died; and that the uſual time for a woman to go with child, is nine months and ten days, to wit, ſolar months; at thirty days to the month, and not lunar months; and that by reaſon of the want of ſtrength in the woman or the child, or by reaſon of ill uſage, ſhe might be a longer time, *viz.* to the end of ten months or more. And the phyſicians farther affirmed, that a perfect birth may be at ſeven months, according to the ſtrength of the mother or child, which is as long before the time of the proper birth. And by the ſame reaſon it may be as long deferred by accident, which is commonly occaſioned by infirmities of the body, or paſſions of the mind. And the child was adjudged to be legitimate. *Cro. Jac.* 541. * 185

II. Securing the reputed father.

By the 6 *G.* c. 31. Whereas the laws now in being are not ſufficient to provide for the ſecuring and indemnifying pariſhes and other places, from the great charges frequently ariſing from children begotten and born out of lawful matrimony; it is enacted, *That if any ſingle woman ſhall be delivered of a baſtard child, which ſhall be chargeable,*

or

or likely to become chargeable to any pariſh or extraparochial place; or ſhall declare herſelf to be with child, and that ſuch child is likely to be born a baſtard, and to be chargeable to any pariſh or extraparochial place; and ſhall in either of ſuch caſes, in an examination (A) *to be taken in writing, upon oath, before one juſtice of the county, city, or town corporate, where ſuch pariſh or place ſhall lie, charge any perſon with having gotten her with child; it ſhall be lawful for ſuch juſtice, upon application made to him by the overſeers of the poor of ſuch pariſh, or one of them, or by any ſubſtantial houſholder of ſuch extraparochial place, to iſſue out his warrant* (B) *for the immediate apprehending ſuch perſon ſo charged as aforeſaid, and for bringing him before ſuch juſtice, or before any other of his majeſty's juſtices of the peace of ſuch county, city, or town corporate: And the juſtice before whom ſuch perſon ſhall be brought ſhall commit* (C) *him to the common gaol or houſe of correction, unleſs he ſhall give ſecurity* (D) *to indemnify ſuch pariſh or place, or ſhall enter into a recognizance* (E) *with ſufficient ſurety, upon condition to appear at the next general quarter ſeſſions, or general ſeſſions, of the peace, to be holden for ſuch county or liberty, and to abide and perform ſuch order or orders*
186 *as ſhall be made,* in purſuance of an act paſſed in the 18th year of the reign of her late majeſty queen Eliſabeth, concerning baſtards begotten and born out of lawful matrimony.* ſ. 1.

Iſſue out his warrant for immediate apprehending] If the conſtable, having a warrant to apprehend the reputed father, ſhall willingly or negligently ſuffer him to eſcape; he may be bound over to the ſeſſions, and there indicted, fined, and impriſoned: and under the influence thereof be compelled to make ſatisfaction to the proſecutors.

To appear at the next general quarter ſeſſions] It hath been uſual, to bind ſuch perſon to appear, not at the next ſeſſions generally, but at the next ſeſſions after the child ſhall be born; upon a principle of convenience, leſt, if the child ſhould not be born, or the mother not be able to go before the juſtices in order to filiate the child, before the next ſeſſions, the reputed father ſhould be gone, and the deſign of the act be fruſtrated. But the words of the act muſt be purſued; and therefore he muſt be bound *to appear at the next general quarter ſeſſions* [or, *general ſeſſions*] *of the peace* to be holden for ſuch county or liberty, *and to abide and perform ſuch order or orders as ſhall be made in purſuance of an act paſſed in the 18th year of the reign of her late majeſty queen Eliſabeth, concerning baſtards begotten and born out of lawful matrimony.*

Eliſabeth] This ſtatute recites the name of queen *Eliſabeth* with the letter *ſ*; whereas the ſtatutes themſelves of that queen's reign do always exhibit her name with a *z*. Which is noted here only, as not exactly agreeable to that preciſion which ordinarily is required in reciting acts of parliament in caſes penal.

And if ſuch woman ſhall die, or be married, before ſhe ſhall be delivered, or miſcarry of ſuch child, or ſhall appear not to have been with child at the time of her examination, ſuch perſon ſhall be diſcharged from his recognizance at the next ſeſſions, or immediately releaſed out of cuſtody by warrant of one juſtice reſiding in or near the limits where ſuch pariſh or place ſhall lie. ſ. 2.

And

And on application made by any ſuch perſon, who ſhall be committed to any gaol or houſe of correction, or by any perſon on his behalf, to any juſtice reſiding in or near the limits where ſuch pariſh or place ſhall lie; ſuch juſtice ſhall ſummon the overſeers of the poor of ſuch pariſh, or one or more ſubſtantial houſeholder of ſuch extraparochial place, to appear before him at a time and place to be mentioned in ſuch ſummons, to ſhew cauſe why ſuch perſon ſhould not be diſcharged: And if no order ſhall appear to have been made, in purſuance of the 18th of * Eliſ. *within ſix weeks after ſuch woman ſhall have been delivered, ſuch juſtice may diſcharge him from his impriſonment.* ſ. 3. * 187

But it ſhall not be lawful for any juſtice, to ſend for any woman, before ſhe ſhall be delivered, and one month after, in order to her being examined concerning her pregnancy; or to compel any woman, before ſhe ſhall be delivered, to anſwer any queſtions relating to her pregnancy. ſ. 4.

To compel any woman] *M.* 11 *G. K.* and *Chandler.* Indictment for ſecreting a woman big with an illegitimate child, ſo that ſhe could not be had to give evidence about the father. The defendant demurred. And by the court, Judgment muſt be given for the defendant, for the child cannot be illegitimate before it is born, there being always a poſſibility that it may be born in lawful wedlock. And by this act the woman is not to be compelled. *Str.* 612. L. *Raym.* 1368.

III. Bond to indemnify the pariſh.

By the aforeſaid ſtatute of 6 *G.* 2. *c.* 31. The juſtice before whom the party ſhall be brought ſhall commit him, unleſs he ſhall give *ſecurity to indemnify the pariſh*, or enter into recognizance to appear at the ſeſſions.

In this caſe, whether a bond or other ſecurity ought to be made to the churchwardens and overſeers and their ſucceſſors, or to their executors or adminiſtrators, hath been queſtioned: concerning which the author of the *Readings upon the Statutes* ſaith thus: Thoſe gentlemen who have taken upon them to direct the officers, to have ſuch bonds or other ſecurities made to them and their ſucceſſors, would do well to conſider, whether the churchwardens and overſeers are ſuch a corporation as can purchaſe, ſue and be ſued: And whether bonds being things in action, it may not be difficult for the ſucceſſors of the churchwardens and overſeers, to whom they were made, to maintain an action on a bond made to their predeceſſors. It is true, churchwardens may maintain an action for the goods of their church: but they are not ſuch a corporation, as can take or purchaſe lands, or take ſecurities for the uſe of their church, except in London. And it was never pretended, that the churchwardens and overſeers of the poor are a corporation in any reſpect in relation to the poor, and conſequently can neither ſue nor be ſued as ſuch. *Read. Baſt.*

And indeed, upon the whole, the taking of a bond in any kind ſeemeth not ſo convenient for the pariſh, as an order made by the juſtices; becauſe the ſuing upon a bond * is both tedious and expenſive, whereas the courſe of carrying an order into execution is very ſhort and eaſy. * 188

But then, on the other hand a bond will bind a man's executors; but the order of the juſtices being obligatory only upon the man himſelf, when he dies, the order dieth with him.

It

It ſometimes happens, by the mother's removing into another pariſh, that the child is not born in the pariſh indemnified; but this doth not abſolutely quit the bond: becauſe there is a conſequential damage to the pariſh indemnified, which may affect the reputed father. For where the child goes with the mother for nurture, the pariſh where the child was born, and not the pariſh where it reſides with the mother, is bound to maintain it. As in the caſe of *Simpſon* and *Johnſon*, *M.* 19 *G.* 3. which was a caſe reſerved from the aſſizes for the opinion of the court, on an action of debt upon a bond. The defendant *Johnſon*, being apprehended by virtue of a warrant under the ſtatute of 6 *G.* 2. gave bond in the uſual form to indemnify the pariſh of *Wickham St. Paul*, againſt all coſts, charges, and other demands, touching and concerning a child of which *Jemima Waaſs* was then pregnant, and likely to be born a baſtard. It happened, that before the birth of the child ſhe removed herſelf voluntarily from *Wickham St. Paul* to the pariſh of *Gueſtingthorpe*, and was there delivered of the ſame baſtard child. After her delivery, ſhe returned to the pariſh of *Wickham St. Paul*, where her legal ſettlement was, carrying her child with her, and received 1s. 6d. weekly from the plaintiff *Simpſon*, who was one of the overſeers of the poor there, for the maintenance of herſelf and her child. No order was made by any juſtice, directing the allowance of the ſaid 1s. 6d. or any other ſum to be made by the pariſh officers of *Wickham St. Paul*. And no demand was made at any time on the defendant *Johnſon*, who lived in the adjoining pariſh of *Gueſtingthorpe*; but a demand was made on one of his ſureties, who refuſed to pay.—The court were ſo clearly of opinion with the defendant that they would not hear his counſel. Lord *Mansfield* ſaid, that the payment by the pariſh officers of *Wickham* was doubly voluntary; firſt, becauſe there had been no order upon them to pay; and ſecondly, becauſe they were not liable to maintain the child, but the pariſh where it was born, and they ſhould have applied to the officers of that pariſh. *Douglas*, 7.—And this pariſh, by virtue of the bond, might have a remedy over againſt the reputed father.

*189 *This queſtion, whether children under ſeven years of age, who are living with their mother for nurture at the place of the mother's ſettlement, but whoſe own ſettlement is in another pariſh, are to be maintained by the pariſh where the mother lives and is ſettled, was determined in the caſe of *Darlington* and *Hemlington*, *H.* 17 *G.* 3. *Eleanor Guy* went with a certificate from the townſhip of *Hemlington* in the North Riding of the county of *York*, to the townſhip of *Darlington* in the county of *Durham*, and during her reſidence at *Darlington* bore two baſtard children there. Afterwards becoming chargeable, two juſtices removed the ſaid *Eleanor Guy* from the ſaid townſhip of *Darlington* to the ſaid townſhip of *Hemlington* which gave the certificate: but ſaid nothing in their order of removal concerning the two baſtard children, one of whom was then four years of age, and the other two years. The mother took them with her to *Hemlington*. Whereupon *Hemlington* applied to ſome of the juſtices in the county of *Durham*, for an order upon the townſhip of *Darlington* to maintain the ſaid two baſtard children then reſiding at *Hemlington* with their mother as nurſe children. And after ſummoning the overſeers of *Darlington* to ſhew cauſe, two juſtices

juſtices of the county of *Durham* made an order upon the overſeers of *Darlington* to pay to the overſeers of *Hemlington* two ſhillings weekly, for the maintenance of the ſaid two baſtard children, whilſt nurſe children with their mother at *Hemlington*. The overſeers of *Darlington* appealed againſt this order of maintenance; but offered to receive and provide for the children in the townſhip of *Darlington*. The ſingle queſtion before the ſeſſions was, "Whether the townſhip of *Darlington* "was or was not obliged to pay to the townſhip of *Hemlington* any "relief for the two baſtard children, whilſt they remained with their "mother as nurſe children at, and at the expence of, the ſaid townſhip "of *Hemlington*, ſhe refuſing to part with them to the townſhip of "*Darlington*." And the ſeſſions, being of opinion that they were not obliged, quaſhed the order of maintenance. The proceedings being removed into the court of king's bench, the court were of opinion, that the townſhip of *Darlington* was obliged to maintain the two children at *Hemlington*, whilſt reſiding there with their mother as nurſe children; and therefore quaſhed the order of ſeſſions, and affirmed the order of the two juſtices. *M. S.*

And there is no difference as to this point between baſtards and legitimate children: As in the caſe of *Shermandbury* and *Bolney*. (*Carth.* 279.) A woman with three * children, all under ſeven years of age, being ſettled in *Shermandbury*, married a man ſettled in *Bolney*. After the marriage, the mother and three children were ſent to *Bolney*. The pariſh of *Shermandbury*, before the marriage, allowed 3s. a week for the three children; and the payment being diſcontinued after the marriage, two juſtices, on complaint of the pariſh of *Bolney*, made an order that *Shermandbury* ſhould continue to pay the 3s. The ſeſſions, and afterwards the court of king's bench, confirmed the order of the juſtices. And the court ſaid, This caſe is within the equity of the ſtatute for relief of the poor; and there is no reaſon that *Shermandbury* ſhould be diſcharged of the children by their mother's marriage. *Douglas*, 10. * 190

M. 21 G. 3. *Kirk* and *Strickland*. It was moved for a rule to ſhew cauſe, why the defendant ſhould not be diſcharged upon filing common bail. It was an action of debt upon a bond, conditioned for the indemnification of a pariſh againſt a baſtard child. The penalty in the bond was 50*l*; and the plaintiff, in his affidavit for holding the defendant to bail, had ſworn that he was juſtly indebted to him in that ſum. But the defendant, in the affidavit on which this motion was grounded, ſwore that only 3*l* and ſome odd ſhillings were really due. The court ſaid the conduct of the plaintiff was altogether unjuſtifiable, and that he was liable to an action: That in the caſe of a bond conditioned for the performance of a promiſe of marriage, and in ſome other inſtances, the penalty is the real debt: but, in other caſes, the bail could only be taken for the ſum to which the plaintiff would be intitled in damages for the breach of the condition. At firſt, however, they ſeemed to think they could not relieve the defendant upon this ſummary application, it having been a uniform rule not to go into the merits upon ſuch a motion, but to take the matter as it ſtood upon the affidavit to hold to bail; but at laſt they granted the rule, declaring that they were perſuaded the plaintiff would not venture to ſhew cauſe againſt it. *Douglas*, 432.

E. 18 *G.* 3. *Brangwin* and *Perrot.* It was moved for leave to pay 40l (being the whole penalty of a bond to indemnify a parish against a baſtard child) into court, with coſts. It was objected, that this was an action for a ſingle breach of the bond, on which the pariſh was intitled to recover; after which, the penalty ſhall ſtill remain in full force to anſwer ſubſequent breaches, as they may ariſe, *in infinitum.* But not allowed by the court: And the lord chief juſtice *De Grey* ſaid, This is
191 ſo plain a caſe, that nothing that one can ſay can make it plainer. The bond aſcertains the damage by conſent of parties. If therefore the defendant pays the plaintiff the whole ſtated damages, what can he deſire more? *Black. Rep.* 1190.

IV. Order of filiation and maintenance by the juſtices.

If ſecurity hath not been given to indemnify the pariſh, the next thing in the courſe of proceeding is the order of filiation and maintenance to be made by the juſtices.

By the 18 *El. c.* 3. *Concerning baſtards begotten and born out of lawful matrimony, the ſaid baſtards being now left to be kept at the charges of the pariſh where they were born, to the great burden of the ſame pariſh, and to the evil example and encouragement of lewd life, it is enacted, that two juſtices* (1 Q) *in or next unto the limits where the pariſh church is, within which pariſh ſuch baſtard ſhall be born, upon examination of the cauſe and circumſtances* (F), *ſhall and may by their diſcretion, take order* (G) *as well for the puniſhment of the mother and reputed father, as alſo for the better relief of ſuch pariſh, in part or in all; and ſhall and may, by like diſcretion, take order for the keeping of every ſuch baſtard child, by charging ſuch mother or reputed father, with the payment of money weekly, or other ſuſtentation, for the relief of ſuch child, in ſuch ways as they ſhall think meet and convenient. And if after the ſame order by them ſubſcribed under their hands, the mother or reputed father, upon notice thereof, ſhall not for their part obſerve and perform the ſaid order, that then every ſuch party ſo making default in not performing the ſaid order, to be committed to ward in the common gaol, there to remain without bail or mainpriſe, except he or ſhe ſhall put in ſufficient ſurety* (H) *to perform the ſaid order, or elſe perſonally to appear at the next general ſeſſions of the peace, to be holden in that county where ſuch order ſhall be taken; and alſo to abide ſuch order, as the ſaid juſtices, or the more part of them, then and there ſhall take in that behalf (if they then and there ſhall take any); and if at the ſaid ſeſſions, the ſaid juſtices ſhall take no other order, then to abide and perform the order before made, as is aboveſaid.*

And by the 3 *Cha. c.* 4. *All juſtices of the peace within their ſeveral limits and precincts, and in their ſeveral ſeſſions, may do and execute all things concerning that part of the ſaid ſtatute, that by juſtices of the peace in the ſeveral counties are by the ſaid ſtatute limited to be done.* Upon which ſtatute of the 3 *Cha.* there hath been great diverſity of opinion, whether or no the ſeſſions hath power thereby to make an origi-
192 nal order in the caſe of baſtardy, without the matter coming before them by way of appeal. As to thoſe who hold the negative, namely, that

that the ſeſſions cannot proceed originally upon the ſaid ſtatute of the 3 *Cha.* it is clearly obſervable, although their opinion may be true, that it reſteth upon a falſe foundation, namely, upon a ſuppoſition that the ſaid ſtatute of 3 *Cha.* is expired; which is no other than a palpable overſight committed by one author, and followed by others without examination (a thing not unuſual in this kind of learning). For the ſaid ſtatute of 3 *Cha. c.* 4. was enacted to be in force until the end of the firſt ſeſſion of the then next parliament. Which next parliament was in the 16 *Cha.* and by an act of that parliament, namely, by the 16 *Cha. c.* 4. the ſaid ſtatute of 3 *Cha. c.* 4. together with many other ſtatutes then near expiring, are enacted to be in force, until ſome other act of parliament ſhall be made touching their continuance or diſcontinuance: Which other act was never made.

Suppoſing therefore that the ſaid act of 3 *Cha. c.* 4. is in force, the queſtion is, Whether by virtue thereof the ſeſſions have power to make an original order of baſtardy. Concerning which in ſupport of the negative opinion, the hiſtory and progreſs of the ſaid ſtatute of 3 *Cha.* ſeems conſiderable; which was thus: The act of 18 *El. c.* 3. (as appears from *Raſtal's* ſtatutes) was ſupplementary to, and as it were incorporated with the act of 14 *El. c.* 5. which acts taken together made proviſion for the ordering and maintenance of the poor, and were in effect the groundwork of our preſent poor laws. Which acts (among other particulars) enacted theſe four things: 1. That the juſtices within the ſeveral counties, and alſo the juſtices within cities, boroughs, and towns corporate, within their reſpective limits, ſhall take order by a weekly taxation of all and every the inhabitants for relief of the poor. 2. That with reſpect to baſtard children in particular, two juſtices in or next unto the limits where the pariſh church is, within which pariſh ſuch baſtard ſhall be born, ſhall take order for the keeping ſuch baſtard child, by charging the mother or reputed father, with payment of money weekly, or other ſuſtentation, for the releif of ſuch child. 3. That if any perſon is aggrieved with any ſuch taxation, he may appeal to the next general ſeſſions to be holden within the ſhire... 4. With a proviſo, that the county juſtices ſhall not intromit, or enter into any city, borough, or town corporate, having juſtices of its own, for the execution hereof, for any matter or cauſe ariſing within the precincts of ſuch city, borough, or town corporate: but the juſtices there * ſhall proceed, * 193
as the juſtices elſewhere may do within the reſpective counties.—Now both the ſaid ſtatutes were ſuffered to expire, except only ſo much as is contained in the ſecond paragraph abovementioned, rendring the mother and reputed father of baſtard children liable to maintain them, which was continued from time to time, and is yet in force; therefore the clauſe of appealing, and the power of juſtices in corporations was gone. Upon which account, the ſaid act of 3 *Cha. c.* 4. which revived or continued a great number of temporary acts that by the ſeveral intermiſſions of parliament in thoſe days had expired or were near expiring, and at the ſame time explaining or amending divers of thoſe acts as occaſion might require, ſpeaking of this act of 18 *El.* ſays thus: *And ſo much of an act made in the eighteenth year of the reign of the late queen Elizabeth, intituled, An act for ſetting the poor on work and avoiding idleneſs, as concerneth baſtards begotten out of lawful matrimony*

[ſhall be continued]: *With this*; *That all juſtices of the peace within their ſeveral limits and precincts, and in their ſeveral ſeſſions, may do and execute all things concerning that part of the ſaid ſtatute, that by juſtices of the peace in the ſeveral counties are by the ſaid ſtatute limited to be done.*—So that the power of proceeding originally in the ſeſſions cannot (as it ſeemeth) hereby be ſupported; but the juſtices, whether of the counties at large, or of towns corporate or other franchiſes, out of their ſeſſions, are to charge the mother and reputed father; and if any perſon is aggrieved, he may appeal to the ſeſſions: juſt in the ſame manner, as if the aboveſaid four clauſes were all ſtill in force.

The principal caſes which have been adjudged in this matter are theſe following:

H. 9 *Cha. Pridgeon*'s caſe. *Pridgeon* was brought to the bar upon an *habeas corpus*; and it appeared, upon the return thereof, that upon complaint to the two next juſtices he was by them ordered to keep a baſtard child, he being according to the ſaid order the reputed father. From this order he appealed to the next ſeſſions; at which ſeſſions the matter being examined, he was diſcharged, and the order of the two juſtices repealed. Afterwards, at another ſeſſions, the matter being re-examined, it was ordered according to the firſt order of the two juſtices, that he ſhould be accounted the reputed father of the baſtard, and ſhould keep it; and that if he did not perform it, he ſhould be apprehended and committed. And thereupon being apprehended and committed, and all this matter returned, the court held, that he being diſ-
*194 charged *at the next ſeſſions, to which he appealed according to the ſtatute of 18 *El.* the ſecond ſeſſions hath no power to alter it. And becauſe none were there to maintain this return, he was bailed, and day given, that if other matter were not ſhewed before ſuch a time, he ſhould be diſcharged. Afterwards, this matter being moved again, all the court delivered their opinions *ſeriatim*, that the order in the firſt ſeſſions was concluſive, and the order in the laſt ſeſſions was merely void. For the ſtature of 18 *El.* appointing, that upon appeal to the ſeſſions from an order of two juſtices, their order ſhall bind him who is adjudged to be the reputed father; and in this caſe, having appealed to the ſeſſions, and they making an order in court, that order is final, and no other ſeſſions nor authority may meddle therewith. And it was held, that the ſtatute of 3 *Cha.* doth not aid this caſe; for the ſtatute there is, that *if the two next juſtices make not proviſion for the baſtard, the juſtices at their quarter ſeſſions ſhall ſettle an order for keeping of the baſtard as the two next juſtices ought*: But it doth not give more power or authority, nor gives authority to one ſeſſions to alter that which in a former ſeſſions was ordered. *Cro. Car.* 341, 350.

E. 10 *Cha. Slater*'s caſe. *William Slater* was by *Elizabeth Eton* charged with the getting of a baſtard child on her body. The two next juſtices did not make any order in it according to the ſtatute of 18 *El.* But the cauſe came firſt to be heard at the ſeſſions, where the juſtices ordered that *Slater* ſhould be diſcharged of the child, and adjudged *Alexander Leigh* to be the reputed father. Afterwards, on complaint to the judges of aſſize, the judges ordered, that two of the next juſtices to the pariſh where the child was born (naming them) ſhould take conſideration thereof according to the ſtatute, and ſettle ſuch courſe therein

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as to juſtice appertained: Whereupon thoſe two juſtices declared the ſaid *William Slater* to be the reputed father; and on his refuſing to pay the ſum ordered by them for the maintenance of the child, they committed him. Upon removal of the proceedings into the court of king's bench, theſe two points were reſolved by the whole court: 1. That before the ſtatute of 3 *Cha.* the ſeſſions had no authority to meddle in the caſe of baſtardy, till the two next juſtices according to the ſtatute of 18 *El.* had made an order therein; and that then, and not before, on the party refuſing to perform the order, and giving ſecurity to appear at the ſeſſions and abide ſuch order as the juſtices then and there ſhould make, the juſtices at the ſeſſions might make a new order, otherwiſe * not. 2. That * 195
by the ſtatute of 3 *Cha.* the juſtices in ſeſſions have power originally to make an order; and therefore that the firſt order made by the ſeſſions was in this caſe good and legal, and the ſecond order made by the two next juſtices void, and could not alter or revoke the order which was firſt made by good authority. And for proof thereof was cited *Pridgeon*'s caſe. *Cro. Car.* 470.

T. 13 *Cha. Wood*'s caſe. On complaint to the ſeſſions againſt a woman having a baſtard child, the matter was by them referred according to law to the two next juſtices to have the examination and ordering thereof. The ſaid two juſtices made an order againſt *John Wood* to be the reputed father, and ordered him to pay a weekly ſum towards the maintenance of the ſaid child. *Wood* appealed to the ſeſſions. And the juſtices there, on a re-examination of the matter, diſallowed of the order made by the two juſtices, and they there made a new order, by which they charged one *William Cole* to be the reputed father. On a reference of the matter to Sir *William Jones* judge of aſſize, and both the orders being read in court, that is, the order made by the two next juſtices, and the ſubſequent order made at the ſeſſions, he would not enter into the re-examination of this cauſe, but did, *in omnibus*, affirm the laſt order made by the ſeſſions upon appeal to them from the firſt order; which laſt order made at the ſeſſions was final, and no appeal to be admitted againſt it: and this, he ſaid, had been adjudged divers times, and mentioned particularly *Pridgeon*'s caſe. 2 *Bulſtr.* 355.

T. 4 *An.* Q. and *Weſton. Weſton*, being adjudged by the two next juſtices to be the reputed father, appealed to the ſeſſions, where the order was confirmed, and he committed for not paying the money ordered. It was objected, that the ſeſſions ſhould have proceeded againſt him upon his recognizance. By *Holt* chief juſtice: If they proceed on the 18 *El.* the ſeſſions hath no power to commit, but to proceed upon his recognizance; but if on the 3 *Cha.* the ſeſſions may commit as the two juſtices might have done, that is, unleſs the party put in ſecurity to perform the order, or to appear at the next ſeſſions. 1 *Salk.* 122.

M. 8 *G. K.* and *Cleg.* An order of baſtardy was made at the ſeſſions (which was admitted to have original juriſdiction); and it was objected, that it was not ſaid in the order that the defendant was ever ſummoned or appeared, and natural juſtice required that he ſhould at leaſt have an opportunity to defend himſelf.——By *Pratt* chief juſtice: I believe

*196 believe theſe orders made originally at ſeſſions are *very rare, the uſual way being to bring the matter before the ſeſſions by way of appeal from the order of two juſtices. Now if it ſhould be taken, that the order of two juſtices will be well enough, without their ſhewing a ſummons or appearance; yet I think this caſe will fall under a very different conſideration. For in the other caſe, the party has an opportunity to relieve himſelf by appeal, whereas upon an original order at ſeſſions he can have no opportunity to bring the matter to a farther examination; ſo that it is but a lewd woman's going behind his back and ſwearing a baſtard upon him, by which means the moſt innocent man in the world may be condemned.——But the matter went off upon the point, whether it was neceſſary that the ſummons ſhould appear upon the face of the order. *Str.* 475.

Finally, in the caſe of *K.* and *Greaves*, *E.* 21 *G.* 3. An original order of baſtardy was made at ſeſſions, which being removed into the king's bench by certiorari, a rule was granted to ſhew cauſe why it ſhould not be quaſhed. The principal objection was, that the ſeſſions have no original juriſdiction. In ſupport of the order it was ſaid, that there are four or five caſes which have decided that the ſtatute of 3 *Cha.* gives to the ſeſſions an original juriſdiction. And the order was confirmed. *Douglas*, 610.

So that whatever may be underſtood to have been the primary intention of the ſtatute, the point ſeems now to be ſettled upon the authority of theſe caſes, that the ſeſſions have power to make an original order in caſe of baſtardy: But inſtances of this kind have been ſo exceeding rare, that no caſe hath occurred wherein it hath been determined; What or whether any remedy the reputed father is intitled to, if he is diſſatisfied with ſuch order. In *Weſton*'s caſe above-mentioned, *Holt* chief juſtice ſaid, that the ſeſſions may commit as the two juſtices might have done, unleſs the party put in ſurety to perform the order, or to appear at the next ſeſſions: Which implies an appeal from the ſame court, to the ſame court, a thing not uſual in other like caſes, an appeal importing the removal of a cauſe from an inferior to a higher juriſdiction. On the other hand, lord chief juſtice *Pratt* in *Gleg's* caſe, ſaid, that upon an original order at ſeſſions, the party hath no opportunity to relieve himſelf by way of appeal, and from hence urges the extreme neceſſity of a ſtrict and regular ſummons of the reputed father, leſt he happen to be condemned unheard.

The ſaid baſtards being now left to be kept at the charges of the pariſh
*197 *where they be born*] For at that time they could *have no other ſettlement. There were only two kinds of ſettlements then exiſting; the one was by birth, and the other where the perſon ſhould have reſided for the moſt part during the ſpace of three years. So that till the child ſhould be three years of age, it could poſſibly have no other ſettlement. And the place of birth continues to be the ſettlement of baſtard children ſtill, unleſs in ſome few excepted caſes.

Two juſtices in or next unto the limits where the pariſh church is] By this meaſuring, as it were, from the pariſh church, it ſeemeth that no other juſtices can intermeddle. And in this matter this ſtatute of the 18 *El.* is different from moſt other ſtatutes: for generally where power is given to two juſtices, the ſtatutes expreſs that two or more juſtices

may

may do ſuch a thing: but here the ſtatute ſaith only, that two juſtices dwelling in or next unto the pariſh, ſhall have power to take order therein. And Mr. *Dalton* makes a *quæry*, what ſhall be done, if the two next juſtices cannot agree in the order, or ſhall make no order. And this caſe, tho' likely enough to happen, hath not yet been determined. If they will not proceed at all, there ſeemeth to be no doubt, but that they may be compelled by a *mandamus*; But, if they cannot agree; whether one juſtice, not the next, may join with either of the other, in making an order, doth not appear to have been determined. Or, in this caſe there ſeems to be a particular reaſon for applying to the ſeſſions for an original order. Or they may by conſent make an order, and bring the matter to the ſeſſions by way of appeal.

Shall and may by their diſcretion] Here is no *time* limited for their proceeding in this matter; ſo that the order may be made at any time after the birth of the child.

And in the cauſe of *K.* and *Miles*, *M.* 1 *G.* On motion to quaſh an order of baſtardy, it was reſolved, that if the father run away, and return tho' 14 years after, yet an order to fix the child on him is good; for there is no ſtatute of limitation in theſe caſes. 1 *Seſſ. C.* 77.

But by the aforeſaid ſtatute of the 6 *G.* 2. If the reputed father is in priſon, and no order ſhall be made in ſix weeks after the birth of the child, he may in ſuch caſe be diſcharged from his impriſonment; but the order nevertheleſs made upon him afterwards, will be good.

Take order] Herein they muſt proceed as in all other like caſes, by giving the party accuſed an opportunity of being heard in his defence. In the caſe of *K.* and *Cotton*,* *T.* 6 & 7 *G.* 2. An information was moved for againſt the defendant, who with another juſtice made an order of baſtardy upon one *Fitzgerald*, without ſummoning him to appear before them to make his defence. Upon appeal to the ſeſſions he was acquitted, and put to great expences; which it was inſiſted was contrary to natural juſtice. By Mr. Juſtice *Page*; No man in an office can be ſuppoſed to be ſo ignorant, as not to know it is againſt natural juſtice, to convict a man without a ſummons; the examination ought to be ſo made, that the truth may appear, and this muſt be by examining both ſides, otherwiſe it is partial; the ſcandal, the expence, and the diſorder in Mr. *Fitzgerald's* family, are things that ought to be conſidered; here was no taking by warrant, and therefore an action of falſe impriſonment would not lie; and this is the only method can be uſed to puniſh the juſtice. Mr. J. *Probyn*; the principal objection about a ſummons is right in law, and in reaſon; poſſibly an action on the caſe might be framed; there may poſſibly have been only an error in judgment, and it is hard to grant an information. Mr. J. *Lee*; if this was ſtrictly a conviction, againſt which no appeal lies, an information ought to be granted; but he thought the matter was not ſo very ſtrong in the caſe of orders. And the rule was diſcharged. 1. *Seſſ. C.* 179. *198

E. 8. *G.* 2 *K.* v. *Taylor* and *Neale*. Motion in the king's bench for an information againſt the defendants, two juſtices of *Devonſhire*, for making an order on one *Nicholas Mould*, adjudging him to be the putative father

father of a baſtard child, without ſummoning him, and alſo for refuſing to hear his witneſſes. On ſhewing cauſe, it appeared that he was ſummoned by a third juſtice, which the court held to be ſufficient. And by Lord *Hardwicke* Ch. J. If the party, being ſummoned, will not attend himſelf, there is no reaſon the juſtices ſhould hear any defence made for him; for if that were allowed, no offender of this ſort would appear. Therefore the juſtices in this caſe acted right. And it is but as this court does, when orders of baſtardy are removed hither by certiorari: for we never allow any exceptions to be taken to the order, unleſs the party attend in perſon; that the court may take care of him, and make him indemnify the pariſh, if the order is good. 2 *Seſſ. Caſ.* 192. *Caſes in the time of Lord Hardwicke.* 112.

By charging ſuch mother] If the mother ſhall *marry* before any order made, it hath been doubted whether the juſtices can then charge her, as having no effects of her *own, the ſame by the marriage being veſted in the huſband. As in the caſe of *Ellen Bent*, *E.* 5 *G.* 3. She was delivered of a baſtard child in the pariſh of *Clifton*. After which, and before any order made, ſhe married one *Abraham Taylor* of the pariſh of *Middleton*. The overſeers of *Clifton* apply to the juſtices, who made an order of filiation, charging her with 8d a week towards the relief of the pariſh. She pleaded her utter inability, and refuſed to pay. Upon which the juſtices commit her to the houſe of correction. She was brought up by *habeas corpus*, and her council moved for her diſcharge, inſiſting upon the illegality of her commitment; for that, being a married woman, ſhe was not an object of the juſtices juriſdiction, and the huſband was not ſummoned.—But by the court: A feme covert is liable to be proſecuted for crimes committed by her. This woman has diſobeyed the order of the juſtices, and the ſtatute preſcribes the puniſhment here inflicted upon her. There is no need to ſummon the huſband, in a criminal proſecution againſt the wife. *Burrow*, *Mansf.* 1681.

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With the payment of money weekly or other ſuſtentation] That is, to the overſeers for the uſe of ſuch child. But whether the overſeers ſhall have the ſole application of the money, and ordering of ſuch child, or the reputed father may take the child from the pariſh, and provide for it himſelf, hath been doubted, and ſeemeth not yet to have been fully ſettled by the unanimous reſolution of the court. And there are difficulties on both ſides. If the reputed father indemnifies the pariſh, the intention of the act ſeemeth to be anſwered; and there may be ſuppoſed ſomething of natural affection (eſpecially if he acknowledges the child to be his) inclining him to be regardful of the child's welfare: at leaſt more than can be reaſonably expected from pariſh officers. But then, to be allowed to take the child from its mother, with whom the pariſh officers uſually and very properly leave it, whilſt very young, is unnatural and cruel; and it is very rare, that the reputed father ingenuouſly owns himſelf to be the real father. But if the child is of age and ability to be an apprentice or ſervant, and the reputed father can find a proper maſter, it is fit that he ſhould have power to put out the child accordingly, or that his contribution to the pariſh from that time ſhould ceaſe.

In

In the case of *Richards* and *Samon* against *Hodges*, *T.* 2 *Cha.* 2. this point came in question, but the matter went off on an error in the proceedings; which was thus: *Richards* and *Samon*, being churchwardens, brought an action against *Hodges*, on his bond in the usual form to indemnify the parish in the case of a bastard child. The defendant pleaded *Non damnificatus* generally. The plaintiffs replied, that neither the defendant nor any other, for the space of one month after the making of the bond, did provide any maintenance for the child; by reason whereof, the parishioners, to prevent the said child's perishing by hunger and cold, were forced for all the time aforesaid to pay, and have paid 4s for the maintenance and nourishment of the said child. To which the defendant rejoined, that he would have nourished the said child at his proper costs and charges for all the time aforesaid, and offered so to do, as well to the plaintiffs as to other the parishioners, but they refused to permit him, and of their own wrong, and against the will of the defendant, put the said child to nurse, and paid the said 4s. Upon which rejoinder, the plaintiffs demurred in law. And by the court, the rejoinder is not good, because it is a departure from the first plea in bar; for the defendant in his plea says, that the parishioners were not damnified, and when the plaintiffs by their replication shew how they were damnified, there the defendant cannot rejoin that this damnification was of their own wrong, as here he hath done, but he ought to have pleaded that at first in his plea at bar. And tho' it was urged for the defendant, that this was no damnification at all, because it was the voluntary act of the parish to put the child to nurse, when the defendant himself offered to maintain it, and that they ought not to take advantage of their own wrong; yet it was not allowed: For the court held clearly, that the rejoinder was a departure; and for that reason, it was adjudged for the plaintiffs. 2 *Saunders*, 83.

M. 21. *Ch.* 2. *Burwell*'s case. Two justices order the reputed father to pay so much a week to the parish, until the child should be 12 years of age. This was held by the court to be wrong; and the reason given was, because the father might take it away when he pleased; and therefore the order ought to have been, that he should pay so long as the child should be chargeable to the parish. 1 *Ventr.* 48.

E. 24 *Ch.* 2. *Sherman*'s case. An order was made, that the father should pay so much a week, till the child should be able to get its living by working. It was said by *Twisden* this order could not be good; for perhaps the father would take it away and maintain it himself, which he may do if he pleaseth. 1 *Ventr.* 210.

* *E.* 11 *An.* Q. and *Smith*. Order to pay 1s a week, till the child is 8 years old. It was objected, that it should be so long as the child is chargeable; possibly he may gain a settlement; or a person may give him an estate; or the father may take him. By the court: This is only a remote possibility. As to the father's taking him, he ought to have done it at first; and by suffering the order to be made, it shall be deemed a refusal in law; besides, * 201

he ſhall not then be ſuffered; he may ſell him; or make away with him, as too often happens. *Caſ. of S.* 64.

T. 27 *G.* 2. *Newland* and *Oſman.* Debt upon a bond, with a condition to indemnify and ſave harmleſs the pariſh of *Eling* from a baſtard child. Plea; that the defendant had maintained, ſupported, and nouriſhed the ſaid child to a certain day, that is to ſay, to the 27th of October laſt, and that then he offered to take the ſaid child to maintain, which they refuſed, and that if the churchwardens or any of them have been damnified, it is of their own wrong. Replication; that for 3 weeks from and after the ſaid 27th day of October, the defendant did not provide nouriſhment for the child, but failed, and by reaſon whereof the plaintiffs, after the three weeks, expended 3s for the maintenance of the child, and ſo were damnified. Demurrer; and joinder in demurrer. The queſtion of law is, Whether a putative father may take a baſtard child into his own cuſtody to maintain it, or whether the pariſh ſhall have the care of it. And the caſe in 2 *Saund.* 83. was mentioned, wherein the court held this to be a good plea. 1 *Ventr.* 48. that the father may maintain the child himſelf. 1 *Ventr.* 210. that the juſtices can only make an order to maintain, ſo long as the child ſhall be chargeable.—By *Lee* Ch. J. The right way is, to make the order, ſo long as the child ſhall be chargeable. It is not to be limited to any certain time. And the reaſon given in all theſe caſes is, that the father or mother may take it before the time. The intention of the ſtatute of Elizabeth was, to have a proviſion for the baſtard, and at the ſame time to indemnify pariſhes. And the law could never think of taking the care and education of children from their parents. Nor could this enter into the mind of any judge. Nouriſhing and maintaining certainly anſwers education. It hath been objected, that the excuſe is collateral: I do not think ſo; for all the inhabitants are parties, and the overſeers are but truſtees for them. It ſeems a ſufficient excuſe; and there is no anſwer on the part of the plaintiff to it. No objection has
* 202 ever been thought of to pleas of this kind. *—— *Wright* J. In the caſe in *Saunders*, it ſeems to have been admitted, that if this had been pleaded in the firſt inſtance, it would have been good. I never did hear before, that the care of the child devolved upon the pariſh, where there was any other perſon to take care of it. They are obliged to maintain the child, where it is in danger of ſtarving. This court has conſtantly held, that the father has a right to take it away, by quaſhing the orders made in manner above mentioned. This is not a collateral excuſe; but ſuch an one as will ſave the penalty. And I cannot ſee that the pariſh has any ſort of right or intereſt in the child. ——— *Denniſon* J. The material objection taken to this plea is, Whether or no the putative father of a baſtard child can by the law of England take his baſtard child from the pariſh. I never did hear this doubted before. And I think that the notion that he cannot, is not to be countenanced nor encouraged. The law does not ſuppoſe, that a man will not maintain his own child. It is ſaid, the next heir is not to be truſted

with

with the guardianſhip. I am ſorry that it was ever introduced into the law of England. It is an injurious notion of the people of England. I will rather ſuppoſe, that the pariſh officers will be cruel to the child, than the father. All the caſes admit tacitly that the father hath ſuch a power. And ſome of them ſay ſo expreſsly. And I am very well ſatisfied that the law is ſo. Inhabitants, church-wardens, overſeers, are all the ſame; and every part of the condition is anſwered. I have known this plea very often pleaded. And that caſe in *Saunders* is the rule. ——— *Foſter* J. I am not ſo clear in theſe points. I think the care of educating baſtard children, is not to be conſidered as a burden on the pariſh, but as a truſt; and that it ſhould not be ſo eaſy for fathers to take them out of their care and cuſtody. The ſtatute is expreſs, that the juſtices ſhall order the father to contribute to the pariſh for the maintenance of the child. Tho' it is not to be ſuppoſed that fathers will deſtroy their baſtard children, yet they may look upon them as a burden and a ſhame, and therefore either neglect them, or put them into improper hands. The reſolutions and orders of juſtices of the peace have been grounded upon this; not for requiring ſecurity till the child came to a certain age, but becauſe the order included the age too far. Therefore I am not ſo clear. The caſe in *Saunders* was only his own opinion.——Judgment for the defendant, unleſs deſired to be argued again this term. (This was at the deſire of the plaintiff's counſel.) MS.

* Finally, in the caſe of *Holland* againſt *Malken* and *Briſtow*, *T.* 33 & 34 *G.* 2. In the common pleas. (Which was on a ſuit upon a bond for indemnifying the plaintiff from the charges of a baſtard child, but it went off upon an error in the pleadings). The court ſaid, we need not in this caſe ſay, whether the father or the mother hath a right to have the child while under 7 years of age. And by the lord chief juſtice *Wilmot*: I give no opinion, whether the father has any power over the child, who is *nullius filius*. Grotius ſays truly, the mother is the only certain parent. And an order of juſtices to remove the mother, always removes the child. 2 *Wilſon*, 126. *203

Upon the whole, there are two conſiderations, which ſeem to reduce the unlimited power in ſeveral of the aforeſaid caſes, of the reputed father taking the child when he pleaſes, into a very narrow compaſs. One is, that nothing is more eſtabliſhed, than that a child ſhall not be taken from its mother, without her conſent, before it is ſeven years of age. The other is, That an order made by the juſtices, and confirmed at the ſeſſions, or not appealed againſt, is binding upon the reputed father; and no other juſtices, in or out of ſeſſions, have power to intermeddle: And ſo it is laid down in one of the aforeſaid caſes, that "if the father take the "child he muſt do it at firſt; and by ſuffering the order to be "made, it ſhall be deemed a refuſal in law; and he ſhall not "then be ſuffered, he may ſell it or make away with it, as too "often happens." So that it ſhould ſeem upon theſe premiſſes,

that the time for the reputed father to inſiſt upon taking the child cannot be until after it is ſeven years of age; nor even then, if an order has been made, and it is not to be ſuppoſed that the pariſh officers will forbear for ſeven years applying for an order, only to give the reputed father an opportunity to put in his claim.

After all. Whatever exalted notions ſpeculative and humane perſons may entertain of the dignity of human nature and the tenderneſs of parents towards their children, it ſeemeth that large abatements ought to be made in reſpect of that kind of parents here ſpoken of. In practice it is ſeldom, if ever, known, that a reputed father, who applies to have the child taken off from the pariſh into his own management, even ſo much as pretends any advantage to the child thereby, but merely his own intereſt, to ſave charges. He does not want to have the child better provided for, but cheaper. If he ſhould offer any thing for the good of the child, whereby he himſelf would not receive any benefit, much more if attended with ſome ſmall additional * expence to him, there is no doubt but the pariſh would be willing enough to accede to his propoſal. And it is well known in fact, that where the reputed father openly acknowledges the child, and is a man of ſome ſubſtance ſo as not to be likely to run away, the pariſh ſeldom gives him any diſturbance; or if they be applied to in behalf of the child, they are for the moſt part ready to join with him in any reaſonable accommodation.

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Such party ſo making default in not performing the ſaid order, to be committed] Until default ſhall be made, the juſtices have no power to commit, or to require ſureties for performance of the order, or for appearing at the ſeſſions. L. *Raym.* 858. 3 *Salk.* 66. 1 *Barnardiſt.* 261.

And hereby a paſſage might be left open to avoid the future payments, by the reputed father complying at preſent, and afterwards running away. But the aforeſaid ſtatute of the 6 G. 2. c. 31. ſeemeth to have been intended to remedy this inconvenience, by which one or more juſtices, either before or after the birth, may commit him to the gaol or houſe of correction, unleſs he ſhall give ſecurity to indemnify the pariſh, or otherwiſe enter into recognizance to abide ſuch order or orders as ſhall be made in purſuance of the act of the 18 *El.*

To be committed to ward to the common gaol] In the aforeſaid caſe of *Ellen Bent*, the juſtices had committed her to the houſe of correction. It was objected that the ſtatute gives no power to do this; but the commitment, if any, ought to have been to the common gaol. But that was held by the court to be well enough. For the ſtatute of the 7 *J.* c. 4. gives power to commit ſuch lewd women to the houſe of correction. And by the 6 *G.* c. 19. a general power is given, for ſmall offences, or for want of ſureties to commit either to the gaol or houſe of correction. *Burr. Manſf.* 1681.

Except he ſhall put in ſufficient ſurety to perform the ſaid order] That is, by recognizance; which, if the order is diſobeyed, ſhall be

be forfeited, and eſtreated into the exchequer. But this makes nothing for the relief of the pariſh. And therefore it were better if ſuch recognizance, or other ſecurity, upon default, might be made aſſignable to the pariſh officers; or elſe, that the perſon not paying, as well as not giving ſecurity, might be committed till payment ſhould be made. Or if no ſecurity is given, it ſeemeth that the priſoner, diſobeying the order, may be indicted, fined, and impriſoned for the contempt.——If the orders are removed into the king's bench, and there * confirmed; the court, on non-performance will grant an attachment. * 205

It frequently happens, that the reputed father, by giving bond to indemnify the pariſh, eſcapes paying any thing towards the maintenance of the child, unleſs the mother with her child, will throw herſelf upon the pariſh, which ſometimes perhaps her ability will not permit, or otherwiſe ſhe diſdains to do. In ſuch caſe it hath been adviſed ſometimes, for the woman's father to bring an action againſt the man for ſpecial damage ſuſtained by the loſs of his daughter's ſervice; and a jury according to circumſtances, will give reaſonable compenſation.—That is, if ſhe be under the age of 21, and not emancipated from the father; or be, at the time, a part of her father's family and in his ſervice. As in the two following caſes:

E. 6 *G.* 3. *Poſtlethwaite* and *Parkes*. This was an action of treſpaſs with force and arms, for an aſſault upon the plaintiff's daughter, and getting her with child: And the declaration concluded, *whereby he loſt her ſervice*. It was tried at the aſſizes before Mr. Juſtice *Bathurſt*, and a verdict given for the plaintiff, and 40s damages. A ſpecial caſe was ſtated, to this effect: The plaintiff's daughter being 23 years of age, hired herſelf to one *Saul*, as a ſervant; and went to live with *Saul* her maſter, and ſerved him ſome time. During her ſervice, ſhe was gotten with child, by the defendant; and becoming big with child, and unable thereby to perform her ſervice as ſhe was uſed and ought to do, ſhe was diſcharged by *Saul* her maſter, who paid her her wages in proportion to the ſervice ſhe had already done him; and the plaintiff her father received her, when no one elſe would, and lodged and boarded her in his houſe. She was there delivered of a baſtard child; and the plaintiff, her father, maintained her in her lying-in, at his own expence. The queſtion which aroſe at the trial, and which was reſerved for the opinion of the court of king's bench was, "Whether the plaintiff can maintain this action." In the argument of this cauſe two points were made, 1. Whether the father and daughter can be conſidered as maſter and ſervant. 2. Whether her age makes any difference in the caſe, as ſhe was upwards of 21, namely 23 years of age.—Mr. *Davenport*, for the plaintiff argued, That the action is maintainable by the father, upon the foot of being her maſter; as he has alledged, *whereby he loſt her ſervice*. He agreed, that no action would lie, but by reaſon of the loſs of her ſervice. Here a daughter goes out to ſervice, is gotten

*206 * gotten with child, discharged, and returned upon her father, helpless and unable, in that condition to maintain herself. He is obliged by law to maintain her; and did so from the necessity of the thing. Therefore, from the consequential damage, an action is maintainable by her father, in whose house she resided; and where she must, in this case, be considered as a servant. And this case is not to be considered upon the foot of emancipation: Her being 23 years of age makes no difference. This young woman's master could not bring an action against this defendant; he had sustained no damage, having discharged her as soon as she became unserviceable to him. No body but the father could sue. And the damage is the same to him, whether she be over or under 21.——Mr. *Wallace*, on the other side, argued for the defendant. The foundation of actions of this kind hath been, the *loss of service*. The father's interest in the child, whatever it might have been during infancy, ceases at the child's coming to the age of 21. Many injuries may be done to a child, which are not the subjects of actions by the father. Indeed an action will lie by a father, for taking away his son or his daughter, and there is a writ provided for him in the register for that purpose. But no action will lie for debauching his daughter. If the father maintains the daughter in his own house, he is intitled to her service, and may maintain an action for the loss of her service. But here, she was hired out to service in another man's house. If she had been under age, and under her father's roof, I would agree that he had been intitled to an action as for the loss of service. No instance can be produced, no precedent of such an action as this is. And the principle will not hold; because it depends upon the loss of service, which was not the present case.—Upon the whole it appeared that the parties were poor. The court therefore proposed a compromise; which was accepted: namely, that all proceedings be stayed, without costs on either side. Lord *Mansfield* added, that it was not upon any doubt, in point of law, that he proposed the compromise; meaning, as it seemeth, that he was clear that the action in this case would not lie. And upon that supposition, the reporter says he has ventured to report it, tho' it was not determined judicially and in form. However, he says, there can be no doubt, but that the court were all of opinion, that the action could not be maintained: And therefore, in compassion to the plaintiff, whose daughter had been injured by the defendant, they wished to save him from the payment of costs. *Bur. Mansf.* 1878.

*207 * *E.* 9 *G.* 3. *Tullidge* and *Wade*. In the common pleas. An action of trespass was brought against the defendant, for that he with force and arms made an assault upon the daughter and servant of the plaintiff, and got her with child, whereby he lost the benefit of her service for a certain space of time, and was put to great charge and expence in her time of lying-in. The defendant pleaded not guilty. The cause was tried at the assizes before Mr. Justice *Gould*; when the jury found a verdict for the plaintiff, and gave him

him 50l damages. It was moved for a new trial; and the motion was grounded upon an affidavit tending to ſhew, that under the circumſtances of the caſe a pearing at the trial, the damages were exceſſive; and alſo, that evidence was given at the trial, of a promiſe of marriage made by the defendant to the woman, which ought not to have been permitted, becauſe ſhe may have another ſort of action upon that promiſe. Whereupon Mr. Juſtice *Gould* made his report to the court: And after ſtating the declaration as above, he ſaid, that this daughter of the plaintiff was called as a witneſs at the trial, and ſwore, that the plaintiff her father was a maltſter, and kept a public houſe; that ſhe was his ſervant, and was about 30 years of age; that the defendant was an exciſeman, made his addreſſes to her as a lover, with an intention (as ſhe then thought) to marry her; that he was well received on that account by the plaintiff her father, and very civilly treated by him and his family, and often ſpent the evening with them: She alſo ſwore, that he promiſed her marriage, and got her with child. Her brother alſo was called, who depoſed, that the plaintiff was wholly deprived of his ſaid daughter's ſervice and aſſiſtance in his buſineſs, and paid ſome money on account of her lying-in. The counſel for the defendant, at the trial, objected to the evidence given, as to the promiſe of marriage. Upon which, ſhe offered to give the defendant a releaſe as to that promiſe; but the counſel for the defendant refuſed to accept thereof. Upon ſumming up the evidence to the jury, the judge told them (as he was pleaſed to ſay) over and over again, that in giving damages in this action, they muſt not conſider the injury done to the woman as to the promiſe of marriage, but muſt leave that matter quite out of the queſtion, becauſe ſhe might have her action for breach of that promiſe; that he thought the plaintiff her father was by nature bound to take care of her while ſhe laid-in, and that they ſhould conſider his expences on that account, as well as his loſs of his daughter's ſervice. Whereupon the jury gave 50l * damages, with which the judge ſaid * 208
he was not at all diſſatisfied; and that he thought, if the jury had then conſidered the promiſe of marriage, they would have given ſix times as much damages.—By the lord chief juſtice *Wilmot*: Actions of this ſort are brought for example's ſake. And altho' the plaintiff's loſs in this caſe may not really amount to the value of twenty ſhillings, yet the jury have done right in giving liberal damages. And if the daughter brings another action againſt the defendant for the breach of promiſe of marriage, ſo much the better: he ought to be puniſhed both ways. Her being of the age of 30, is nothing to mitigate damages, or leſſen the defendant's fault. And we will pay no regard to any affidavit read to us, the judge who tried the cauſe being ſatisfied with the verdict. If much greater damages had been given, we ſhould not have been diſſatisfied therewith, the plaintiff having received this inſult in his own houſe, where he had civilly received the defendant, and permitted him to make his addreſſes to his daughter.—And the motion

tion for a new trial was rejected, and the plaintiff had judgment by the whole court. 3 *Wilson*, 18.

The usual approved form of the order of filiation and maintenance is as follows:

Westmorland. *THE order of* J. P. *and* K. P. *esquires, two of his majesty's justices of the peace in and for the said county, one whereof is of the quorum, and both residing* [*in*, or,] *next unto the limits of the parish church within the parish of* ——— *in the said county, made the* ——— *day of* ——— *in the* ——— *year* ——— *concerning a (male) bastard child, lately born in the parish of* ——— *aforesaid, of the body of* A. M. *single woman:*

Whereas it hath appeared unto us the said justices, as well upon the complaint of the churchwardens and overseers of the poor of the said parish of ——— *as upon the oath of the said* A. M. *that she the said* A. M. *on the* ——— *day of* ——— *now last past, was delivered of a (male) bastard child at* ——— *in the parish of* ——— *in the said county, and that the said bastard child is now chargeable to the said parish of* ——— *and likely so to continue; and further that* A. F. *of* ——— *in the said county, yeoman, did beget the said bastard child on the body of the said* A. M. *And whereas the said* A. F. *hath appeared before us, in pursuance of our summons for that purpose, but hath not shewed any sufficient cause why he the said* A. F. *shall not be the* * 209 *reputed father of the said* * *bastard child:* [Or, *And whereas it hath been duly proved to us upon oath, that the said* A. F. *hath been duly summoned to appear before us the said justices, to the end we might examine into the cause and circumstances of the premisses; and whereas he the said* A. F. *hath neglected to appear before us, according to the said summons:*] *We therefore upon examination of the cause and circumstance of the premisses, as well upon the oath of the said* A. M. *as otherwise, do hereby adjudge him the said* A. F. *to be the reputed father of the said bastard child.*

And thereupon we do order, as well for the better relief of the said parish of ——— *as for the sustentation and relief of the said bastard child, that the said* A. F. *shall and do forthwith, upon notice of this our order, pay or cause to be paid to the said churchwardens and overseers of the poor of the said parish of* ——— *or to some or one of them the sum of* ——— *for and towards the lying-in of the said* A. M. *and the maintenance of the said bastard child, to the time of making this our order.*

And we do also hereby further order, that the said A. F. *shall likewise pay or cause to be paid to the churchwardens and overseers of the poor of the said parish of* ——— *for the time being, or to some or one of them, the sum of* ——— *weekly, and every week from this present time, for and towards the keeping, sustentation, and maintenance of the said bastard child, for and during so long time, as the said bastard child shall be chargeable to the said parish of* ———.

And we do further order, that the said A. M. *shall also pay or cause to be paid to the said churchwardens and overseers of the poor of the said parish of* ——— *for the time being, or to some or one of them, the sum of* ——— *weekly and every week, so long as the said bastard child shall be chargeable to the said parish of* ——— *in case she shall not nurse and take care of the said child herself.*

Given under our hands and seals the day and year first above written.

One

One whereof is of the quorum] Many orders formerly have been quashed, for want of setting forth that one of the justices was of the *quorum*; but now by the statute of 26 G. 2. c. 27. no order shall be quashed for that defect only.

Whereas it hath appeared unto us] *K.* and *Beard.* The examination of the woman must be by two justices, as well as the ordering part: for the examination is a judicial act, and ought to be by both; and it is not enough * that one should examine, and make report to the other; but if they are both present, and one only examine, it is well enough, for it is in fact the examination of both. 2 *Salk.* 478. *210

So in the case of *Billings* against *Prinn* and *Dolabere* esquires, *T.* 15 G. 3. An action of trespass and false imprisonment was brought by the plaintiff, for committing her to prison for refusing to filiate a bastard child. She was examined severally, at separate times (but in the same day), and in separate places, by the two justices the defendants, and they separately signed the warrant of commitment. On trial at the assizes, a verdict was given for the plaintiff, with 5l damages. It was moved for a new trial, and argued, that it was sufficient under the statute, if the two justices joined in and consented to the commitment, but that they might examine and adjudge the matter, and sign the warrant, separately. Unto which it was answered, that where two or more are required to do any act, they must meet together: Else what they resolve on is the mind of individuals, not of the whole body. And this hath always been the doctrine with respect to justices of the peace. By the court: This case is so clear, that it cannot bear an argument. There is no use in appointing two or more persons to exercise judicial powers, unless they are to act together. Separate examinations by different magistrates may produce different facts. On which then is the adjudication to proceed? It is exceeding clear, that in case of an action thus brought to try the validity of the commitment, it cannot be supported by law. *Black. Rep.* 1017.

As well upon the complaint of the churchwardens and overseers] It hath been said that an order made without the complaint of the parish officers, is not good. *Blackerby*, 44.

But in the case of *K.* and *Buckall*, *M.* 3 G. 2. where it was objected, that the order did not appear to be made upon complaint of the parish; it was answered, that the statute does not require that the parish should complain, but gives the justices power to make such order on the complaint of any other. And the order, as to that part, was confirmed. 1 *Barnardist.* 261.

As upon the oath of the said A. M.] It seemeth, that the mother may be examined upon oath, concerning the reputed father, and of the time and other circumstances; for that in this case, the matter, and trial thereof, * dependeth chiefly upon the examination and testimony of the mother. *Dalt. c.* 11. *211

Was delivered of a (male) bastard child] *H.* 8 *G. K.* and *England.* An order was quashed, because the sex of the bastard, or the name

of it were not mentioned; only, a certain baſtard child born of the body of ſuch a woman. *Str.* 503.

At ——— *in the ſaid pariſh of* ———] *M.* 11 *Ann.* Q. and *Caſh.* The order did not ſet forth that the child was born in the pariſh; and by the ſtatute the juſtices cannot make an order to compel a man to contribute towards the maintenance of a baſtard child, but in caſe of that pariſh where the child was born: And quaſhed for this reaſon. *Caſ. of S.* 59.

T. 7 *G. K.* and *Butcher.* Exception was taken to an order of baſtardy, that it did not appear the child was born in the pariſh to which the relief is ordered; for it ran; *We two juſtices of the borough of* Lime Regis, *reſiding within the limits where the pariſh church is, within which pariſh the child was born*—Which is only an averment, that the juſtices reſided in that pariſh, where the child was born, but that might not be the ſame pariſh ordered to be relieved. And for this fault the order was quaſhed. *Str.* 437.

E. 3 *G.* 2. *K.* and *Childers.* On a rule to ſhew cauſe, why an order of two juſtices for relief of a baſtard child, and an order of ſeſſions confirming the ſame, ſhould not be quaſhed; it was objected, that it was not directly adjudged that the child was born in the pariſh (of *Stapleburſt*), and yet the order requires the defendant to pay the ſum of 45s to the churchwardens of that pariſh to reimburſe them. It was anſwered, that it doth ſufficiently appear in the order, that the child was born there; for it adjudges, that the defendant ſhould pay this ſum, for the charges the pariſh of *Stapleburſt* were at upon account of the woman's lying in there. But the court ſaid, that they do not allow of inferences to give the juſtices juriſdiction; and accordingly quaſhed both the orders. 1 *Barnardiſt.* 326.

E. 10 *G.* 2. *K.* and *Greaves.* The pariſh where the child is born, is only to be indemnified; and if the baſtard has acquired a ſettlement elſewhere, the father is then diſcharged. *Neſſ.* Baſt.

Chargeable to the ſaid pariſh] Order to provide for a baſtard child: Exception was taken, that the order doth not * ſet forth that he is chargeable to the pariſh, or likely to be ſo. And quaſhed by the court. *Comb.* 39.

* 212

But in *K.* and *Matthews*, *H.* 8 *W.* Exception was taken, that the order doth not ſet forth that the child is likely to become chargeable: But this exception was over-ruled; for that it is ſelf-evident, that every baſtard child is likely to become chargeable. 2 *Salk.* 475, 6.

And further that A. F. of ——— *in the ſaid county, yeoman, did beget the ſaid baſtard child*] *T.* 2 *G.* 2. *K.* and *Browne.* Upon an order of baſtardy it was ſtated, that the huſband had been abſent ſix years, and that during his abſence the defendant *had carnal knowledge* of the wife, and therefore they adjudge him to be the putative father. But by the court. This order muſt be quaſhed; for his lying with her is not a ſufficient reaſon to infer him the father of this child: and tho' the juſtices need not ſhew the grounds

grounds they go upon, yet if they do, and it appears no ſufficient ground, their order will be bad. *Stra.* 811.

Do hereby adjudge] *T.* 4 *Ann. Q.* and *Weſton.* The great objection which ſtuck long with the court, was, that it was ſaid in the order, we the ſaid juſtices *doth* adjudge, inſtead of *do* adjudge; and after the caſe had depended two terms, and being ſeveral times ſtirred, the court for that exception, the laſt day of the term, quaſhed the order. L. *Raym.* 1198.

And afterwards, *H.* 4 *Ann.* The ſame juſtices made another order, with the very ſame fault in it, *viz. doth* adjudge; and upon a certiorari, that was quaſhed. L. *Raym.* 1198.

Adjudge the ſaid A. F. *to be the reputed father*] *E.* 20. *C.* 2. *K.* and *Perkaſſe.* An order was quaſhed, becauſe, there was no adjudication, that the perſon againſt whom the complaint was made, was the reputed father. 2 *Sid.* 363.

H. 9 *G.* 2. *K.* and *Jenkins.* Motion to quaſh an order of two juſtices, whereby they adjudge, that ſuch a perſon is *not* the putative father of a baſtard child, and therefore they diſcharge him; and the rather, becauſe in ſuch a caſe the pariſh cannot appeal, becauſe an appeal is only, when the party refuſes to give ſecurity to come to ſeſſions. And by the whole court, the two juſtices have no ſuch authority: for their whole power depends on the ſtatute of 18 *Eliz.* and that is only to take order for puniſhment of the parties, and for relief of the pariſh, and this order is for neither the one nor the other. 2 *Seſſ. C.* 161. *Str.* 1050.

* *The ſum of* ——— *for and towards the lying-in*] *M.* 12 *Ann.* *213 *Q.* and *Odam.* Order for maintenance of a baſtard child, was excepted to, becauſe the defendant is upon ſight of the order to pay 9l in groſs; and after that, ſo much weekly. And by the court: By the ſtatute the juſtices are to take order for relief of the pariſh, and keeping of the child, by payment of money weekly, or other ſuſtentation; and this may be only indemnifying the pariſh for money laid out before the reputed father was found. 1 *Salk.* 124.

During ſo long time as the ſaid baſtard child ſhall be chargeable] *E.* 9 *W. K.* and *Barebaker.* An order to pay ſo much money by the week, till the child ſhall be fourteen years of age, was adjudged to be bad: for the juſtices have no power but to indemnify the pariſh; and that is only to oblige him to maintain the child, as long as it is or may be chargeable. 1 *Salk.* 121. 2 *Salk.* 478.

An order that the putative father ſhould pay ſo much a week, until it ſhould be able to get its living by working, was quaſhed; it ſhould have been for ſo long time, as the child ſhall be chargeable to the pariſh. 1 *Vent.* 210.

But in the caſe of *K.* and *Street*, *M.* 1 *G.* 2. An order of baſtardy was made, to pay ſo much weekly, till the child was nine years old, if it ſhould ſo long live. And by the court, it is a good order, for we cannot intend it able to provide for itſelf ſooner. *Str.* 788.

So in the case of *K.* and *Buckall*, *M.* 1 *G.* 2. Exception was taken, that the order appointed the sum of 2s to be paid weekly, till the child should come to the age of twelve years, without saying, if the child shall be so long chargeable to the parish. It was answered, that indeed the old authorities lay it down in general, that orders of bastardy, as well as other orders relating to the poor, must be under the limitation mentioned; but the later authorities have been, that orders of bastardy need not: and this, it was said, is founded upon good reason; for there cannot be any reasonable intendment, that bastards, who have no kindred, will have provision from any body, till such an age as is mentioned in the order. And of that opinion was the court, and confirmed the order as to that point. 1 *Barnardiſt.* 261.

But then the child may be bound an apprentice into another parish before that age; and having gained a settlement in such other parish, the effect of the order should then cease. Therefore it is best in this and all such like cases to hold to the statute: and the statute here only gives * power to the justices *to take order for the relief of the parish where the child shall be born.*

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In *Browne's* case, *T.* 9 *W.* it was said, the justices cannot order a sum, for putting out the child an apprentice. *Comb* 448.

But in the aforesaid case of *K.* and *Buckall*, *M.* 3 *G.* 2. Where it was objected, that the order was for the reputed father to pay 4l to the overseers for binding the child out apprentice, when it should come to the age of 12 years; and did not say, if the child shall want it; so that tho' the child should be provided for in any other way, the sum must be still paid to the overseers: The objection was over-ruled by the court; and the order, as to that, held good. 1 *Barnardiſt.* 261.

But it seemeth not necessary to incumber the order therewith; for it may be the same thing if the parish bind him out, and pay the money; for until such sum shall be run off by the weekly payments, so long the child continues chargeable.

BUT after all, so far as these errors above rehearsed shall affect only the form of the order, and not the merits thereof; the same may be amended at the sessions, by the 5 G. 2. c. 19. before the appeal shall be proceeded upon, and then the court shall go upon the merits.

V. *Appeal against the order.*

By the aforesaid statute of the 18 *El.* c. 3. the mother or reputed father refusing to perform the order of the two justices shall be committed, unless they shall put in sufficient surety to perform the said order, or else "personally to appear at the next general sessions of "the peace, to be holden in that county where such order shall be "taken; and also to abide such order, as the said justices, or the "more part of them, then and there shall take in that behalf (if

"they

" they then and there ſhall take any); and that if at the ſaid ſeſſi-
" ons, the ſaid juſtices ſhall take no other order, then to abide and
" perform the order before made, as is aboveſaid."

Perſonally to appear] *H.* 8 *W. K.* and *Matthews.* It was moved to quaſh an order for maintaining a baſtard child. It was anſwered, that no order relating to a baſtard child can be quaſhed, unleſs the reputed father be preſent in court. Unto which the court aſſented. But it appearing to be a hard caſe, a rule was made to ſhew cauſe. On ſhewing cauſe, it was quaſhed; but the court would not * quaſh * 215
it, till the reputed father came into court. 2 *Salk.* 475.

H. 33 *G. K.* and *Gibſon.* It was moved to quaſh an order of baſtardy; which, being indefenſible, was accordingly done; the defendant entering into recognizance to abide the order of the ſeſſions below: which was the reaſon (the court ſaid) why a perſonal appearance of the defendant was in theſe caſes always required. *Black. Rep.* 198.

At the next general ſeſſions] That is to ſay, the next general ſeſſions after notice of ſuch order. 3 *Keb.* 551.

General ſeſſions] *T.* 10 *W. K.* and *Shaw.* An order was made by two juſtices, adjudging *Shaw* to be the reputed father of a baſtard; whereupon he appealed to the next *quarter* ſeſſions after notice; where the order of the two juſtices was diſcharged: And now it was moved to quaſh the order of ſeſſions, becauſe by the ſtatute the appeal muſt be to the next *general* ſeſſions, and there might have been a general ſeſſions before the general quarter ſeſſions, as in *London* or *Middleſex*, where there are four general ſeſſions in the year, beſides the quarter ſeſſions. And quaſhed for this fault. 2 *Salk.* 482.

To be holden in that county] It was moved to quaſh an order, for that it was at the ſeſſions of the peace *in* the county aforeſaid, and did not ſay *for* the county; but this was over-ruled, for that there is not ſo much ſtrictneſs required in orders, as there is in indictments. 1 *Ventr.* 37.

To which may be added alſo, that this is according to the words of the ſtatute.

In that county where ſuch order ſhall be taken] *T.* 15 *Cha.* 2. *K.* and *Coxſon.* Reſolved, that this ſhall be intended of the next ſeſſions of that part of the county, where it was made, and not at the next ſeſſions in any county at large; for that would be miſchievous in many counties, where there are ſeveral ſeſſions in diſtinct parts of the county. 1 *Sid.* 149.

To abide ſuch order as the ſaid juſtices, or the more part of them, ſhall then and there take.] *M.* 13 *G. K.* and *Tenant.* The order of two juſtices being quaſhed upon the merits by the ſeſſions on an appeal, the defendant is thereby legally acquitted, and cannot be drawn in queſtion again for the ſame fact. L. *Raym.* 1423, 4. *Str.* 716.

* But the order quaſhed for want of form, is as no order at all; * 216
and therefore the two juſtices may proceed *de novo*.

It

If the two next juſtices make an order, and the party appeals to the next ſeſſions, and they alter or diſcharge (upon the merits), or confirm that order; no other ſeſſions can order any thing contrary thereto, for the order upon the appeal is final. *Cro. Car.* 350.

T. 1 *G.* 2. *K.* and *Arundell.* Two juſtices make an order, that the defendant ſhall pay a ſum in groſs, and alſo 2s a week ſo long as the child ſhall be chargeable. The party appeals to the ſeſſions, who confirm the order. At a ſubſequent ſeſſions, the father of the baſtard deſired to have the keeping of it, and that the payment of the 2s a week ſhould ceaſe; which the ſecond ſeſſions ordered. Motion was made to quaſh this laſt order of ſeſſions, becauſe in this caſe they had no juriſdiction. And the court held, that the ſecond ſeſſions had no authority to order the ſubtraction of the 2s a week; and the order was quaſhed, becauſe it was made out of time (being three years after the appeal), and therefore the juſtices had no juriſdiction. 1 *Seſſ. G.* 234.

VI. Puniſhment of the mother and reputed father.

By the 18 *El. c.* 3. "Concerning baſtards being left to be kept "at the charges of the pariſh where born, to the great burden "thereof, and to the evil example and encouragement of lewd "life, it is enacted, that the two next juſtices ſhall take order there-"in, as well for the puniſhment of the mother and reputed father, "as for the relief of the pariſh."

And by 7 *J. c.* 4. "Every lewd woman which ſhall have any "baſtard which may be chargeable to the pariſh, the juſtices of "the peace ſhall commit ſuch lewd woman to the houſe of cor-"rection, there to be puniſhed and ſet on work, during the term "of one whole year; and if ſhe ſhall eftſoons offend again, then "to be committed to the ſaid houſe of correction as aforeſaid, and "there to remain until ſhe can put in good ſureties for her good "behaviour, not to offend ſo again. ſ. 7.

Baſtard which may be chargeable] It ſeemeth by theſe words, that ſuch woman ſhall not be ſent to the houſe of correction, until after the child be born, and that it be living: for it muſt be ſuch a child as may be chargeable to the pariſh. *Dalt. c.* 11.

And if ſhe will diſcharge the pariſh of keeping the baſtard, ſhe cannot be puniſhed by this ſtatute of 7 *J.*

*217 * But nevertheleſs ſhe may be puniſhed (Lord *Coke* ſays) by the ſtatute of 18 *El.* 2 Inſt. 733.

Which opinion ſeems juſtly queſtionable: for the preamble of the ſaid act of 18 *El.* (as hath been rehearſed) ſeemeth to reſtrain the juriſdiction of the juſtices to the parents of ſuch baſtard children only as are *left to be kept at the charges of the pariſh where born.*

The juſtices of the peace ſhall commit] It ſeemeth that ſuch commitment ought to be by two juſtices at the leaſt; and by compar-

ing

ing the two ſtatutes together, it ſeemeth fitteſt for the two next juſtices authorized by the 18 *El.* Dalt. *c.* 11.

Shall commit ſuch lewd woman] But ſuch puniſhment ſhall not be until after the woman is delivered of her child; neither are the juſtices to meddle with a woman, until the child be born, and ſhe ſtrong again. *Dalt. c.* 11.

Alſo it ſeemeth, that ſuch baſtard child is not to be ſent with the mother to the houſe of correction, but rather that the child ſhould remain in the town where it was born (or ſettled with the mother) and there to be relieved by the work of the mother, or by relief from the reputed father; and yet the common opinion and practice is otherwiſe, *viz.* to ſend the child with the mother to the houſe of correction; and this may alſo ſeem reaſonable, where the child ſucketh on the mother. *Dalt. c.* 11.

But it ſeemeth much the beſt, to commit the mother only, and not the child, but leave it to her choice whether ſhe will take it with her; and if ſhe will not, then to ſend it to its lawful place of ſettlement.

Then to be committed to the ſaid houſe of correction as aforeſaid] Which words do imply that ſhe ſhall not be puniſhed, as for a ſecond offence, unleſs ſhe hath been committed to and puniſhed in the houſe of correction for the firſt.

VII. Mother or reputed father running away.

" Whereas the putative fathers and lewd mothers of baſtard " children run away out of the pariſh, and ſometimes out of the " county, and leave the baſtard children upon the charge of the " pariſh where they are born, altho' they have eſtates ſufficient to " diſcharge the pariſh; it ſhall be lawful for the churchwardens, and " overſeers of the poor of ſuch pariſh where any baſtard child ſhall " be born, to take and ſeize ſo much of the goods, and receive ſo " much of the annual rents or profits of the lands of ſuch * puta- * 218
" tive father or lewd mother, as ſhall be ordered by any two juſ- " tices, towards the diſcharge of the pariſh, to be confirmed at the " ſeſſions, for the bringing up and providing for ſuch baſtard " child; and thereupon the ſeſſions may make an order for the " churchwardens or overſeers of the poor of ſuch pariſh, to diſ- " poſe of the goods by ſale or otherwiſe, or ſo much of them for " the purpoſes aforeſaid, as the court ſhall think fit, and to receive " the rents and profits of the lands, or ſo much of them as ſhall " be ſo ordered by the ſeſſions." 13 & 14 C. 2. c. 1. ſ. 19.

E. 2 *Ann. Q.* and *Chaffey.* Order to the churchwardens and overſeers, to ſeize of the putative father's goods, what they ſhould judge proper for ſecuring of the pariſh, quaſhed; for that it ſhould be, what the juſtices think proper, and not what the churchwardens and overſeers think proper. L. *Raym.* 858.

VIII. Murdering

VIII. Murdering a baſtard child.

Concealing the death of a baſtard child.

1. By the 21 *J. c.* 27. "If any woman be "delivered of any iſſue of her body, male or fe- "male, which being born alive, ſhould by the "laws of this realm be a baſtard, and ſhe endea- "vour privately, either by drowning, or ſecret burying thereof, or "any other way, either by herſelf, or the procuring of others, ſo "to conceal the death thereof, as that it may not come to light, "whether it were born alive or not, but be concealed, ſhe ſhall "ſuffer death as in caſe of murder, except ſhe can prove by one "witneſs at leaſt, that the child was born dead."

And it hath been adjudged, that in order to convict a woman by force of this ſtatute, there is no need that the indictment be drawn ſpecially, or conclude againſt the form of the ſtatute; for the ſtatute doth not make a new offence, but only makes ſuch concealment an undeniable evidence of murder. 2 *Haw.* 438.

Alſo it hath been agreed, that where a woman appears to have endeavoured to conceal the death of ſuch child within the ſtatute, there is no need of any proof that the child was born alive, or that there were any ſigns of hurt upon the body, but it ſhall be undeniably taken that the child was born alive, and murdered by the mother. 2 *Haw.* 438.

But of late years, as this law ſeemeth to be ſomewhat ſevere, it hath been uſual, upon trials for this offence, to require ſome ſort of preſumptive evidence that the child was born alive, before the other conſtrained preſumption is admitted, that becauſe the death was concealed therefore it was killed by its parent. 4 *Blackſt.* 198.

Alſo, it hath been adjudged, that where a woman lay in a cham-
*219 ber by herſelf, and went to bed without pain and * waked in the night, and knocked for help, but could get none, and was delivered of a child, and put it in a trunk, and did not diſcover it till the following night, yet ſhe was not within the ſtatute, becauſe ſhe knocked for help, 2 *Haw.* 438.

Alſo, it hath been agreed, that if a woman confeſs herſelf with child beforehand, and afterwards be ſurprized and delivered, nobody being with her, ſhe is not within the ſtatute, becauſe there was no intent of concealment, and therefore in ſuch caſes it muſt appear by ſigns of hurt upon the body, or ſome other way, that the child was born alive. 2 *Haw.* 438.

Giving a potion to cauſe abortion.

2. If a woman be with child, and any gives her a potion to deſtroy the child within her, and ſhe take it, and it works ſo ſtrongly that it kills her, this is murder; for it was not given to cure her of a diſeaſe, but unlawfully to deſtroy her child within her; and therefore he that gives her a potion to this end, muſt take the hazard, and if it kills the mother, it is murder. 1 *H. H.* 429, 30.

If

If a woman be quick or great with child, if ſhe take, or another give her any potion to make an abortion, or if a man ſtrike her, whereby the child within her is killed, tho' it be a great crime, yet it is not murder nor manſlaughter by the law of *England*, becauſe it is not yet in *rerum natura*, nor can it legally be known, whether it were killed or not. 1 *H. H.* 433.

But if the child be born alive, and afterwards die of the poiſon or bruiſes it received in the womb; it is murder in ſuch as adminiſtered or gave them. 1 *Haw.* 80. 4 *Blackſt.* 198.

So if a man procure a woman with child to deſtroy her infant when born, and the child is born, and the woman in purſuance of that procurement kill the infant; this is murder in the mother, and the procurer is acceſſary. 1 *H. H.* 433.

IX. Capacity of a baſtard as to inheritance.

A baſtard can have no name of reputation as ſoon as he is born; but after he is born, and hath gained by time a name of reputation, he may purchaſe by his reputed name, to him and to his heirs; tho' he can have no heirs but of his body. 1 *Inſt.* 3. 6 *Co.* 65.

A baſtard is *terminus a quo*; he is the firſt of his family, for he hath no relation of which the law takes any notice; but this muſt be underſtood as to civil purpoſes, for there is a relation as to moral purpoſes; therefore he cannot marry his own mother, or ſiſter, or the like. 3 *Salk.* 66.

* Conſideration of natural affection will not raiſe an uſe to a baſtard; for though there is natural affection between them, yet the raiſing the uſe is a conſtitution of the law, and therefore the uſe ſhall never ariſe. *Jenk.* 47. *Dyer*, 374. * 220

If the iſſue of a man who is a baſtard purchaſe land, and dies without iſſue; tho' the land cannot deſcend to any heir on the part of the father, yet to the heir on the part of the mother (being no baſtard) it may; ſo if the baſtard was attainted: for the heirs of the part of the mother make not any conveyance by the baſtard. *Noy*, 159.

If a baſtard dies inteſtate, without wife or iſſue, the king is entitled to the *perſonalty*; and the ordinary of courſe grants adminiſtration to the patentee or grantee of the crown. 3 *P. Will.* 33. 2 *Black.* 505.

A. Voluntary examination of a woman with child of a baſtard: by 6 *G.* 2. *c.* 31.

Weſtmorland. *THE voluntary examination of* A. M. *of* ——— *in the ſaid county, ſinglewoman, taken on oath before me* ——— *one of his majeſty's juſtices of the peace in and for the ſaid county, this* ——— *day of* ———.

Who ſaith, that ſhe is now with child, and that the ſaid child is likely to be born a baſtard, and to be chargeable to the pariſh of ——— *in the ſaid county, and that* A. F. *of* ——— *in the ſaid county, weaver, is the father of the ſaid child.*

The mark of
† A. M.

Taken and ſigned the day and year above written, before me
J. P.

Examination after the birth.

Weſtmorland. *THE examination of* A. M. *of* ——— *in the ſaid county, ſinglewoman, taken upon oath before me* ——— *one of his majeſty's juſtices of the peace in and for the ſaid county, this* ——— *day of* ———.

Who ſaith, that on ——— *the* ——— *day of* ——— *now laſt paſt, at* ——— *in the pariſh of* ——— *in the county aforeſaid, ſhe the ſaid* A. M. *was delivered of a (male) baſtard child, and that the ſaid baſtard child is likely to become chargeable to the ſaid pariſh of* ———;
* 221 *and that* A. F. *of* * —— *in the ſaid county, weaver, did get her with child of the ſaid baſtard child.*

The mark of
† A. M.

Taken and ſigned the day and year abovewritten, before me
J. P.

B. Warrant for apprehending the reputed father before the birth; on 6 *G.* 2. *c.* 31.

Weſtmorland. } To the conſtable of ———

WHEREAS A. M. *of* ——— *in the ſaid county, ſinglewoman, hath by her voluntary examination taken in writing upon oath, before me* ——— *one of his majeſty's juſtices of the peace in and for the ſaid county, this preſent day declared herſelf to be with child, and that the ſaid child is likely to be born a baſtard, and to be chargeable to the pariſh of* ——— *in the ſaid county, and that* A. F. *of* ——— *in the ſaid county, weaver, is the father of the ſaid child; And whereas* O. P. *one of the overſeers of the poor of the pariſh of* —— *aforeſaid, in order to indemnify the ſaid pariſh in the premiſſes, hath applied to me to iſſue out my warrant for the apprehending of the ſaid* A. F. *I do therefore hereby command you immediately to apprehend the ſaid* A. F. *and to bring him before me or ſome other of his majeſty's juſtices of the peace for the ſaid county, to find ſecurity to indemnify the ſaid pariſh of* ——— *or elſe to find ſufficient*

ſureti

ſurety for his appearance at the next general quarter ſeſſions, [or, *next general ſeſſions*] *of the peace to be holden for the ſaid county, and to abide and perform ſuch order or orders as ſhall be made, in purſuance of an act paſſed in the eighteenth year of the reign of her late majeſty queen* Elizabeth, *concerning baſtards begotten and born out of lawful matrimony. Given under my hand and ſeal the* ——— *day of,* &c.

The like after the birth.

Weſtmorland. { To the conſtable of ———

WHEREAS A. M. *of* ——— *in the ſaid county, ſinglewoman, hath by her examination taken in writing upon oath, before me* ——— *one of his majeſty's juſtices of the peace in and for the ſaid county, declared that on the* ——— *day of* ——— *now laſt paſt, at* ——— *in the pariſh of* ——— * *in the county aforeſaid, ſhe the ſaid* A. M. *was delivered of a (male) baſtard child, and that the ſaid baſtard child is likely to become chargeable to the ſaid pariſh of* ——— *and hath charged* A. F. *of* ——— *in the ſaid county, weaver, with having gotten her with child of the ſaid baſtard child; And whereas* O. P. *one of the overſeers of the poor* [and ſo on, as in the foregoing precedent to the end.] * 222

C. Commitment thereupon; by the 6 G. 2. c. 31.

Weſtmorland. { To the conſtable of ——— in the ſaid county, and to the keeper of the houſe of correction [*or*, common gaol] at ——— in the ſaid county.

WHEREAS A. M. *of* ——— *ſinglewoman, in her voluntary examination taken in writing upon oath, the* ——— *day of* ——— *now laſt paſt, before me* ——— *one of his majeſty's juſtices of the peace in and for the ſaid county, hath declared herſelf to be with child, and that the ſaid child is likely to be born a baſtard, and to be chargeable to the ſaid pariſh of* ——— *and hath charged* A. F. *of* ——— *gentleman, with having gotten her with child of the ſaid child;* [Or, if it is after the birth, then ſay, *Whereas* A. M. *of* ——— *ſinglewoman, in her examination taken in writing upon oath, before me* ——— *one of his majeſty's juſtices of the peace in and for the ſaid county, hath declared that on the* ——— *day of* ——— *now laſt paſt, at* ——— *in the pariſh of* ——— *in the county aforeſaid, ſhe the ſaid* A. M. *was delivered of a (male) baſtard child, and that the ſaid baſtard child is likely*

to become chargeable to the said parish of ——— and hath charged A. F. *of ——— weaver, with having gotten her with child of the said bastard child]; And whereas the said* A. F. *being now personally present before me, being brought by my warrant, upon application for that purpose to me made, by* O. P. *one of the overseers of the poor of the said parish, hath refused to give security to indemnify the said parish, and hath also refused to enter into a recognizance with sufficient surety, upon condition to appear at the next general quarter sessions* [or, *next general sessions*] *of the peace to be holden for the said county, and to abide and perform such order or orders as shall be made in pursuance of an act passed in the eighteenth year of the reign of her late majesty queen* Elizabeth, *concerning bastards begotten and born out of lawful matrimony; These are therefore to command you the said constable to take and convey the said* A. F. *to the house of correction* *223 *at ——— in the said county, and to deliver him to the keeper * thereof, together with this warrant. And I do hereby command you the said keeper of the said house of correction, to receive the said* A. F. *into into your custody in the said house of correction, and him there safely to keep, until he shall give such security, or enter into such recognizance as aforesaid, or be otherwise lawfully delivered from thence. Given under my hand and seal the ——— day of,* &c.

D. Bond to indemnify the parish.

KNOW all men by these presents, that we A. F. *of ——— in the county of ——— gentleman, and* A. S. *of ——— yeoman, are held and firmly bound unto ——— churchwardens, and ——— overseers of the poor of the parish of ——— in the said county (in trust for the parishioners of the said parish) in ——— pounds of good and lawful money of* Great Britain, *to be paid to the said ——— or their certain attorney, their executors, administrators, or assigns: To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each and every of our heirs, executors, and administrators, firmly by these presents; Sealed with our seals, and dated the ——— day of ——— in the ——— year of the reign of our sovereign lord* George *the third, of* Great Britain, France, *and* Ireland, *king, defender of the faith, and so forth, and in the year of our Lord ———.*

The condition of this obligation is such, that whereas A. M. *of ——— singlewoman, hath in and by her voluntary examination, taken in writing and upon oath before ——— one of his majesty's justices of the peace in and for the said county of ——— declared that she is with child, and that the said child is likely to be born a bastard, and to be chargeable to the said parish of ——— and that the abovebounden* A. F. *is the father of the said child;* [If it is after the birth, then say, *that whereas* A. M. *of ——— singlewoman, in her examination taken in writing upon oath, before ——— one of his majesty's justices of the peace in and for the said county, hath declared, that on the ——— day of ——— now last past, at ——— in the parish of ——— in the county aforesaid,*

ſaid, ſhe the ſaid A. M. *was delivered of a (male) baſtard child, and that the ſaid baſtard child is likely to become chargeable to the ſaid pariſh of* ——— *and hath charged the abovebound* A. F. *with having gotten her with child of the ſaid baſtard child;] If therefore the ſaid* A. F. *and* A. S. *or either of them, their or either of their heirs, executors, or adminiſtrators, do and ſhall from time to time, and at all times hereafter, fully and * clearly indemnify and ſave harmleſs, as well the above-named churchwardens and overſeers of the poor of the ſaid pariſh of* ——— *and their ſucceſſors for the time being, as alſo all and ſingular the other pariſhioners and inhabitants of the ſaid pariſh of* ——— *which now are, or hereafter ſhall be for the time being, of and from all manner of coſts, taxes, rates, aſſeſſments, and charges whatſoever, for or by reaſon of the birth, education, and maintenance of the ſaid child, and of and from all actions, ſuits, troubles and other charges and demands whatſoever, touching or concerning the ſame, then this preſent obligation to be void, otherwiſe of force.* * 224

Signed, ſealed, and delivered (having been first duly ſtamped) in the preſence of
A. W.
B. W.

A. F.
A. S.

E. Recognizance for the reputed father to appear at the ſeſſions, and to abide ſuch order as ſhall be made; on 6 *G.* 2. *c.* 31.

Weſtmorland. *BE it remembered, that on the* ——— *day of* ——— *in the* ——— *year of the reign of our lord* George *the third, of* Great Britain, France, *and* Ireland, *king, defender of the faith, and ſo forth,* A. F. *of* ——— *in the county aforeſaid, labourer, and* A. S. *of* ——— *in the county aforeſaid, yeoman, perſonally came before me* J. P. *eſquire one of the juſtices of our ſaid lord the king, aſſigned to keep the peace in the ſaid county, and acknowledged themſelves to owe to our ſaid lord the king; that is to ſay, the ſaid* A. F. *the ſum of* ——— *and the ſaid* A. S. *the ſum of* ——— *of good and lawful money of* Great Britain, *to be made and levied of their goods and chattels, lands and tenements reſpectively to the uſe of our ſaid lord the king, his heirs and ſucceſſors, if the ſaid* A. F. *ſhall make default in the condition under written.*

Whereas A. M. *of* ——— *ſinglewoman, hath in and by her voluntary examination, taken in writing and upon oath, before* ——— *one of his majeſty's juſtices of the peace in and for the ſaid county of* ——— *declared that ſhe is with child, and that the ſaid child is likely to be born a baſtard, and to be chargeable to the ſaid pariſh of* ——— *and that the above bounden* A. F. *is the father of the ſaid child;* [If it is after the birth, then ſay, *Whereas* A. M. *of* ——— *ſinglewoman, in and by her examination taken in writing upon oath, before me* ——— *one of his majeſty's juſtices of the peace in and for the ſaid county, hath declared*

*225 *declared that on the* ——— *day of* ——— *now laſt* * *paſt at* ——— *in the pariſh of* ——— *in the county aforeſaid, ſhe the ſaid* A. M. *was delivered of a (male) baſtard child, and that the ſaid baſtard child is likely to become chargeable to the ſaid pariſh of* ——— *and hath charged the abovebound* A. F. *with having gotten her with child of the ſaid baſtard child:] The condition of this recognizance is ſuch, that if the abovebound* A. F. *do and ſhall appear at the next general quarter ſeſſions* [or, *the next general ſeſſions*] *of the peace to be holden for the ſaid county, and ſhall abide and perform ſuch order or orders as ſhall be made in purſuance of an act paſſed in the eighteenth year of the reign of her late majeſty queen* Eliſabeth, *concerning baſtards begotten and born out of lawful matrimony,—then this recognizance to be void, otherwiſe of force.*

Acknowledged before me.

J. P.

F. Warrant of the two next juſtices, for the mother, with a ſummons for the reputed father, to make the order of filiation and maintenance; on the 18 *El. c.* 3.

Weſtmorland. } To the conſtable of ———

WHEREAS information hath been made unto us ——— *two of his majeſty's juſtices of the peace in and for the ſaid county, one whereof is of the quorum, and both of us reſiding next unto the limits of the pariſh church within the pariſh of* ——— *in the ſaid county, as well upon the complaint of the churchwardens and overſeers of the poor of the ſaid pariſh, as on the oath of* A. M. *of* ——— *ſinglewoman, that on the* ——— *day of* ——— *laſt paſt, ſhe the ſaid* A. M. *was delivered of a (male) baſtard child at* ——— *in the ſaid pariſh, and that* A. F. *of* ——— *in the ſaid county, taylor, is the father of the ſaid baſtard child, and that the ſaid baſtard child is now living, and chargeable* [or, *likely to become chargeable*] *to the ſaid pariſh of* ——— *Theſe are therefore to command you to bring the ſaid* A. M. *before us, at the houſe of* ——— *in* ——— *in the ſaid county, on* ——— *the* ——— *day of* ——— *at the hour of* ——— *in the afternoon of the ſame day, to be by us further examined, touching the premiſſes; and that you give notice thereof, unto the ſaid* A. F. *that he may likewiſe be at the time and place aforeſaid, to make his lawful defence: To the end that upon examination of the cauſe and circumſtance, we may take ſuch order therein, as to right doth appertain. And what you* *226 **ſhall do in the execution hereof, you are to make known unto us at the time and place aforeſaid. Given under our hands and ſeals, the* —— *day of,* &c.

G. The

G. The order of filiation and maintenance is inserted before, in the body of the title.

H. Condition of a recognizance to appear at the next ſeſſions, after the order not performed, on the 18 *El. c.* 3.

WHEREAS by an order under the hands and ſeals of us ——— *two of his majeſty's juſtices of the peace for the ſaid county, one whereof is of the quorum, and both of us reſiding in* [or *next unto*] *the limits of the pariſh church within the pariſh of* ——— *in the ſaid county*; A. F. *of* ——— *in the ſaid county, taylor, is adjudged to be the reputed father of a baſtard child lately born of the body of* A. M. *of* ——— *ſinglewoman, at* ——— *in the ſaid pariſh of* ——— [and then ſet forth what was ordered therein further] *And whereas the ſaid* A. F. *hath not obſerved nor performed the ſaid order: The condition therefore of this recognizance is ſuch, that if the abovebound* A. F. *ſhall obſerve and perform the ſaid order, or ſhall perſonally appear at the next general ſeſſions of the peace, to be holden in and for the ſaid county, and ſhall then and there abide ſuch order as ſhall be then made by the court, concerning the ſaid baſtard child, if any ſuch order ſhall be then made; and if no ſuch order ſhall be then made or taken by the ſaid court, if the ſaid* A. F. *do and ſhall perform the order already by us made as aforeſaid; Then this recognizance to be void.*

Battery. See *Aſſault.*
Bawdy houſes. See *Lewdneſs.*
Beer. See *Exciſe.*
Behaviour. See *Surety.*

B E N T.

WHEREAS on the north-weſt coaſts of England, and eſpecially in the county of Lancaſter, the ſea is bounded, and the lands are prevented from * being overflowed, by large hills, * 227
the ſand of which is ſo looſe, that in dry weather it is thrown by the winds on the adjacent lands, to the damage thereof, and the danger of the inhabitants, who are expoſed thereby to the inundation

dation of the ſea; to prevent which, the land-owners are at great charges, annually to plant and maintain a ſort of ruſh or ſhrub called *ſtarr* or *bent*; but many diſorderly perſons pluck up and carry away the ſame, to make matts and bruſhes: Therefore if any perſon without conſent of the owner, ſhall cut, pull up, or carry away any ſtarr or bent planted or ſet on the ſaid hills on the north-weſt coaſts of *England*, on complaint thereof on oath to one juſtice, the offender ſhall be ſummoned, and on default of appearing, the juſtice ſhall iſſue his warrant to apprehend and bring him before him; and being convicted on oath of one witneſs, or confeſſion, he ſhall forfeit 20s, half to the informer and half to the owner of the bent, by diſtreſs; and for want of ſufficient diſtreſs, to be ſent to the houſe of correction for three months, to be kept to hard labour; and for a ſecond offence, to be committed to the houſe of correction for one year, to be whipt and kept to hard labour.

And if any ſtarr or bent ſhall be found within five miles of the ſaid ſand hills, the perſons convicted of having the ſame in cuſtody ſhall forfeit 20s in like manner, and for want of ſufficient diſtreſs ſhall ſuffer three months impriſonment, and hard labour in the houſe of correction.

But this ſhall not reſtrain any perſons from the exerciſe of any ancient preſcriptive right, to cut ſtarr or bent on the ſea coaſts in the county of *Cumberland*. 15 G. 2. c. 33. ſ. 6, 7, 8.

BIGAMY.

AS *bigamy* in our law ſeems for the moſt part to be uſed to ſignify the having of two wives ſucceſſively one after the other, I ſhall take the liberty to transfer the offence which is commonly treated of under this title unto the title *polygamy*, which ſignifies more properly the having two or more wives or huſbands at the ſame time.

*BLACK ACT.

IN order to avoid repeating the ſame regulations ſo many times over, as the offences here under mentioned are treated of under their reſpective titles in the different parts of this book; it is thought proper to inſert here at large, the whole law relating to them

them altogether, and to refer from thence to this title for the knowledge of the ſeveral particulars.

By the 9 G. c. 22. (commonly called the *Waltham* black act, occaſioned by the enormities committed in Epping foreſt near Waltham in Eſſex, by perſons in diſguiſe, or with their faces blacked) which act is required to be read at every ſeſſions and leet; and by the 6 G. 2. c. 37. and the 10 G. 2. c. 32. which by ſeveral continuances were in force till *Sept.* 1, 1757, *&c.* and finally by the 31 G. 2. c. 42. were made perpetual; and alſo by the 27 G. 2. c. 15. it is enacted as followeth:

If any perſon or perſons, being armed with ſwords, fire-arms, or other offenſive weapons, and having his or their faces blacked, or being otherwiſe diſguiſed, ſhall (1) appear in any foreſt, chaſe, park, paddock, or grounds incloſed with any wall, pale, or other fence, wherein any deer have been or ſhall be uſually kept; or (2) in any warren or place where hares or conies have been or ſhall be uſually kept; or (3) in any high road, open heath, common, or down; or (4) ſhall unlawfully and wilfully hunt, wound, kill, deſtroy, or ſteal any red or fallow deer; or (5) unlawfully rob any warren or place where conies or hares are uſually kept; or (6) ſhall unlawfully ſteal or take away any fiſh out of any river or pond: Or if any perſon or perſons (*that is, whether armed and diſguiſed or not*) ſhall (7) unlawfully and wilfully hunt, wound, kill, deſtroy, or ſteal any red or fallow deer, fed or kept in any places in any of the king's foreſts or chaſes, which are or ſhall be incloſed with pales, rails, or other fences; or in any park, paddock, or grounds incloſed, where deer have been or ſhall be uſually kept; or (8) ſhall unlawfully and maliciouſly break down the head or mound of any fiſh pond, whereby the fiſh ſhall be loſt or deſtroyed; or (9) ſhall unlawfully and maliciouſly kill, maim, or wound any cattle; or (10) cut down or otherwiſe deſtroy any trees planted in any avenue, or growing in any garden, orchard, or plantation, for ornament, ſhelter or profit; or (11) ſhall ſet fire to any houſe, barn, or outhouſe, or to any hovel, cock, mow, or ſtack of * corn, ſtraw, * 229
hay, or wood; or (12) ſhall wilfully and maliciouſly ſhoot at any perſon in any dwelling houſe or other place; or (13) ſhall knowingly ſend any letter without any name ſubſcribed thereto, or ſigned with a fictitious name, demanding money, veniſon, or other valuable thing; [or threatening to kill or murder any of his majeſty's ſubjects, or to burn their houſes, outhouſes, barns, ſtacks of corn or grain, hay or ſtraw; 27 G. 2. c. 15.] or (14) ſhall forcibly reſcue any perſon being lawfully in cuſtody or any officer or other perſon, for any the ſaid offences; or (15) ſhall by gift or promiſe of money, or other reward, procure any of his majeſty's ſubjects to join him or them in any ſuch unlawful act; or (16) ſhall unlawfully and maliciouſly break down, or cut down the bank of any river, or any ſea bank, whereby any lands ſhall be overflowed or damaged; or (17) ſhall unlawfully and maliciouſly cut any hop-binds growing on poles in any plantation of hops; or (18) ſhall

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wilfully and maliciouſly ſet on fire, or cauſe to be ſet on fire, any mine, pit, or delph of coal, or cannel coal:

Every perſon ſo offending, being thereof lawfully convicted (in any county in *England*) ſhall be adjudged guilty of felony, and ſhall ſuffer death as in caſes of felony without benefit of clergy; but not to work corruption of blood, nor forfeiture of lands or goods.

Note; I have added the words above (*whether armed and diſguiſed or not*) to obviate an error which runs thro' moſt of the books, in a very material part of this ſtatute. They do ſuppoſe that a perſon muſt be *armed and diſguiſed* to commit any of the offences abovementioned, even the ſending of a threatning letter, or perſuading another to be an accomplice; whereas it ſeemeth ſomewhat clear, that to be armed and diſguiſed is only neceſſary to conſtitute any of the ſix firſt offences, and that any perſon whatſoever may be guilty of any of the other following offences, whether armed and diſguiſed or not.

Shall appear in any high road] *T.* 9 G. 2. *K.* againſt *Baylis* and *Reynolds*. The indictment was, that the defendants at *Ledford* in the county of *Hereford*, being armed with offenſive weapons, and having their faces blacked, and being diſguiſed, did feloniouſly appear in the high road there, againſt the form of the ſtatute. The evidence was, that there was a great number of rioters aſſembled with intent to cut down ſome turnpikes ſet up in that county, and the priſoners were at the head of them, with their faces blacked ſo
*230 as it could not be known who they were, having * on womens gowns, caps, and ſtraw hats, and each an axe in his hand, and they advancing foremoſt were taken by the conſtables then aſſembled by the juſtices; and after they were taken and confined, the reſt of the rioters did cut down the turnpikes. Lord *Hardwicke* Ch. J. directed the jury thus: The ſeveral facts mentioned in the act are not to be taken as being parts of the ſame offence, but are every of them ſeveral offences; and this is a direct ſeparate crime from the reſt. It is a ſingle crime, and is for appearing in the high road with faces blacked, and being otherwiſe diſguiſed. All the other matters proved are but as circumſtances, but were properly enough given in evidence, in order to ſhew the nature of the fact. Therefore if upon the evidence you believe the priſoners did appear in the high road with their faces blacked, that is ſufficient within the act, or that they were otherwiſe diſguiſed, you are to find them guilty. The jury immediately, without going out of court found them guilty; and they were ordered for execution. *Caſes in the time of lord Hardwicke.* 291.

Kill, maim, or wound any cattle] *M.* 11 G. 3. *K.* and *Paty.* At the aſſizes at *Abingdon*, before Mr. Juſtice *Blackſtone*, the priſoner, a lad of 18 years of age, was capitally convicted, on an indictment for feloniouſly, unlawfully, knowingly, wilfully, and maliciouſly ſhooting at and killing one mare and one colt. It was moved in arreſt of judgment, that the mare and colt are not averred

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ed in the indictment to be *cattle* within this ſtatute, and that the word *cattle* doth not by law neceſſarily include horſes, mares, and colts: That the ſtatutes for regulating the ſale of cattle have thought it neceſſary to mention the ſeveral ſpecies of beaſts to which the proviſions of the ſaid acts ſhall extend: That the book of rates diſtinguiſhes between the ſubſidy on *great cattle* imported, *viz.* 5os; and that on *horſes* and *mares*, *viz.* 10l: That the ſtatute of 22 C. 2. c. 13. diſtinguiſhes between the encouragement given for breeding *cattle of all ſorts*, and for breeding *horſes*: That when the ſtatute of 14 G. 2. c. 6. made it felony without clergy to ſteal *ſheep* or *other cattle*, it was found neceſſary to ſpecify, by 15 G. 2. c. 34. what cattle were intended by the act. Upon theſe objections, the judge reſpited ſentence till the next aſſizes, and in the mean time laid the caſe before all the judges; who unanimouſly agreed, that, as the ſtatute of 22 & 23 C. 2. c. 7. had made the offence of killing horſes by night a ſingle felony, this ſtatute was only to be conſidered as an extenſion of that ſtatute: And ſome precedents were cited * of capital convictions (but none * 231
of executions) upon this branch of the ſtatute. Wherefore it was agreed, that judgment of death ſhould be given at the next aſſizes. [After which, he was reprieved for tranſportation: and afterwards, upon ſtrong applications from the country, received a free pardon.] *Black. Rep.* 721.

Being thereof lawfully convicted in any county in England] In the ſame manner and form, as if the fact had been committed in ſuch county. And it is at the option of the proſecutor in what court he ſhall proſecute. *Black. Rep.* 733.

And for the more eaſy and ſpeedy bringing the offenders to juſtice, if any perſon ſhall be charged with being guilty of any the ſaid offences, before any two juſtices where the offence ſhall be committed, by information of one or more credible perſons on oath by them to be ſubſcribed, the ſaid juſtices ſhall forthwith certify under their hands and ſeals, and return ſuch information to one of the principal ſecretaries of ſtate, who ſhall lay the ſame, as ſoon as conveniently may be, before the king, in his privy council: whereupon the king may make order in ſuch his council, requiring the offender to ſurrender himſelf in forty days, to any of the juſtices of the king's bench, or to any juſtice of the peace, to the end that he may be forthcoming to anſwer the ſaid offence according to the due courſe of law; which order ſhall be forthwith tranſmitted to the ſheriff of the county where the offence was committed, and ſhall (in ſix days after receipt thereof) be proclaimed by him or his officers, between ten and two of the clock, in the market places, on the market days, of two market towns in the county, near the place where the offence was committed; and a true copy of ſuch order ſhall be affixed upon ſome publick place in ſuch market towns: And if ſuch offender ſhall not ſurrender himſelf purſuant to ſuch order, he ſhall from the day appointed for his ſurrender, be adjudged convicted and attainted of

felony, and ſhall ſuffer pains of death, as in caſe of a perſon convicted and attainted by verdict and judgment of felony, without benefit of clergy. And the court of king's bench, or judges of aſſize, on producing to them ſuch order in council, under the ſeal of the ſaid council, may award execution accordingly.

And if any perſon, after the time appointed for ſurrender ſhall be expired, ſhall conceal, aid, abet, or ſuccour ſuch offender, knowing him to have been ſo charged, and to have been required to ſurrender himſelf by ſuch * order, and ſhall be lawfully convicted thereof, he ſhall be guilty of felony without benefit of clergy.

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But this ſhall not hinder any judge, juſtice of the peace, magiſtrate, officer, or miniſter of juſtice, from apprehending and ſecuring ſuch offender, by the ordinary courſe of law: And if he be taken and ſecured before the time of ſurrender, he ſhall have his trial by due courſe of law.

And the inhabitants of the hundred ſhall make ſatisfaction (not exceeding 200l.) for the damages ſuſtained by the killing or maiming of cattle; cutting down or deſtroying trees; ſetting fire to any houſe, barn, or out-houſe, hovel, cock, mow, or ſtack of corn, ſtraw, hay, or wood; breaking or cutting down the bank of any river, or any ſea bank, whereby any lands ſhall be overflowed or damaged; cutting hop-binds growing on poles in any plantation of hops; ſetting on fire, or cauſing to be ſet on fire, any mine, pit, or delph of coal or cannel coal; the ſame to be rateably taxed and levied, as in caſes of robbery by the ſtatute of 27 *El.* c. 13.

But no perſon ſhall be enabled to recover damages, unleſs he ſhall by himſelf or ſervant, in two days after the damage done, give notice of the offence unto ſome of the inhabitants of ſome town, village, or hamlet near to the place where the fact was committed; and ſhall, in four days after ſuch notice, give in his examination on oath, or the examination on oath of his ſervant who had the care of the ſame, before a juſtice inhabiting in or near the hundred, whether he knows the perſon or perſons that committed the fact, or any of them; and if upon ſuch examination it be confeſſed, that the examinant knows the ſaid perſons or any of them, then ſuch perſon confeſſing ſhall be bound by recognizance to proſecute the offender by indictment or otherwiſe according to law.

And if an offender be apprehended and lawfully convicted, in ſix months after the offence committed, the hundred ſhall not be liable.

And the action ſhall not be commenced but within one year after the offence committed.

And if any perſon ſhall apprehend, or cauſe to be convicted, any ſuch offender above mentioned, and ſhall be killed, or wounded ſo as to loſe an eye, or the uſe of any limb, in apprehending or ſecuring, or endeavouring to apprehend or ſecure any ſuch offender; on proof thereof made at the ſeſſions where the offence was committed, or the party killed or wounded, by the perſon ſo apprehending,

prehending or causing the offender to be convicted, or the * person so wounded, or the executors or administrators of the party killed, the justices shall give a certificate thereof to the person wounded, or the executors or administrators of the person killed; by which they shall be intitled to receive of the sheriff 50l, to be allowed in his accounts; which he shall pay in thirty days from the time the certificate shall be shewed to him, on pain of forfeiting to the party 10l, for which, and for the penalty, the party may bring his action. * 233

BLACK LEAD.

IT having been found by experience, that wad, or black cawke, commonly called black lead, is necessary for divers useful purposes, and more particularly in the casting of bomb shells, round shot, and cannon balls, and that the same hath been discovered in one mountain or ridge of hills only in this realm, and great destruction having been made thereof of late years by evil disposed persons; therefore it is enacted, that every person who shall unlawfully break, or by force enter into, any mine or wad hole of wad or black cawke, commonly called black lead, or into any pit, shaft, or vein thereof; or shall unlawfully take and carry away from thence any wad, black cawke, or black lead; or shall aid, hire, or command any person to commit any the said offences, shall be guilty of felony, and the court or judge may order him to be committed to prison, or the house of correction not exceeding one year, to be kept to hard labour, and to be publickly whipt by the common hangman, or by the master of such house of correction, at the times, and places, and in such manner as the court shall think proper; or he may be transported for a term not exceeding seven years; and if he shall voluntarily escape, or break prison, or return from transportation before the time, he shall be guilty of felony without benefit of clergy. 25 G. 2. c. 10. s. 1.

And if any person shall buy or receive any such wad, knowing the same to be unlawfully taken and carried away as aforesaid, he shall be guilty of felony, and be liable to all the penalties inflicted by the laws on persons knowingly buying or receiving stolen goods. s. 3.

Blaſphemy. 1. ALL blaſphemies againſt God, as denying his being or providence; and all contumelious reproaches of Jeſus Chriſt; all profane ſcoffing at the holy ſcriptures, or expoſing any part of them to contempt or ridicule; impoſtures in religion, as falſely pretending to extraordinary commiſſions from God, and terrifying or abuſing the people with falſe denunciations of judgments; and all open lewdneſs groſsly ſcandalous—are puniſhable by fine and impriſonment, and alſo ſuch corporal puniſhment as to the court ſhall ſeem meet, according to the heinouſneſs of the crime. 1 *Haw.* 6, 7.

Defraying the eſtabliſhed religion. 2. Alſo ſeditious words, in derogation of the eſtabliſhed religion, are indictable, as tending to a breach of the peace. 1 *Haw.* 7.

Denying the Trinity. 3. No perſon ſhall have any benefit of the toleration act, who ſhall deny in his preaching or writing, the doctrine of the bleſſed Trinity, as it is ſet forth in the 31 articles. 1 W. ſeſſ. 1. c. 18. ſ. 17.

Repreſenting the Deity in ſtage plays 4. If any perſon ſhall in any ſtage play, interlude, ſhew, may-game, or pageant, jeſtingly or profanely ſpeak or uſe the holy name of God, or of Chriſt Jeſus, or of the Holy Ghoſt, or of the Trinity; he ſhall forfeit 10l, half to the king, and half to him that ſhall ſue. 3 J. c. 21.

Chriſtians defraying the chriſtian religion. 5. If any perſon having been educated in, or at any time having made profeſſion of the chriſtian religion in this realm, ſhall by writing, printing, teaching, or adviſed ſpeaking, deny any one of the perſons in the holy Trinity to be God; or ſhall aſſert or maintain there are more gods than one; or ſhall deny the chriſtian religion to be true, or the holy ſcriptures to be of divine authority; and ſhall be convicted thereof, in any of the courts at *Weſtminſter*, or at the aſſizes, on the oaths of two witneſſes, he ſhall for the firſt offence be incapable to have any office eccleſiaſtical, civil, or military, (unleſs he ſhall renounce ſuch opinion in the court where he was convicted within four months after ſuch conviction); and for the ſecond offence he ſhall be diſabled to be plaintiff, guardian, executor, or adminiſtrator, to take any gift or legacy, or to bear any office, and ſhall be impriſoned for three years. 9 & 10 W. c. 32.

But no perſon ſhall be proſecuted for any words ſpoken unleſs the information be given to a juſtice of the peace, within four
* 235 days after the words ſpoken, and the proſecution * of ſuch offence be within three months after ſuch information. *id.*

6 M. 1 G. 2. *K.* and *Curl.* An information was exhibited by the attorney general, againſt *Edmund Curl*, for printing and publiſhing two obſcene books, the one ſtyled *The nun in her ſmock*; the other, *The art of flogging*; ſetting out the ſeveral lewd paſſages, and concluding againſt the peace. And of this the defendant was found guilty. It was moved in arreſt of judgment, that however the defendant may be puniſhable for this in the ſpiritual court, as an offence againſt good manners; yet it cannot be a libel, for which he is puniſhable in the temporal courts. But after long debate and conſideration, the court at laſt gave it as their unanimous opinion, that this was an offence properly within their juriſdiction; they ſaid, that religion is a part of the common law, and therefore whatever is an offence againſt that, is evidently an offence againſt the common law. And the defendant was ſet in the pillory. *Str.* 788. 1 *Barnardiſt.* 29. *Caſe of Edmund Curl.*

7 E. 2 G. 2. *K.* and *Woolſton.* He was convicted on four informations, for his blaſphemous diſcourſes on the miracles of our Saviour. And attempting to move in arreſt of judgment, the court declared they would not ſuffer it to be debated, whether to write againſt chriſtianity *in general* was not an offence puniſhable in the temporal courts at common law: They deſired it might be taken notice of, that they laid their ſtreſs upon the word *general*, and did not intend to include diſputes between learned men upon particular controverted points. The next term he was brought up, and fined 25l for each of his four diſcourſes, to ſuffer a year's impriſonment, and to enter into a recognizance for his good behaviour during his life, himſelf in 3000l, and 2000l by others. *Str.* 834. *Caſe of Thomas Woolſton.*

8. In the year 1656, *James Nayler* for perſonating our Saviour, and ſuffering his followers to worſhip him, and pay him divine honours, was ſentenced to be ſet in the pillory, and to have his tongue bored thro' with a red hot iron, and to be whipped and ſtigmatized in the forehead with the letter B. *Caſe of James Nayler.*

9 M. 3 G. 3. *K.* and *Peter Annet.* The defendant was convicted on an information, for writing a moſt blaſphemous libel in weekly papers, called the Free Inquirer; to which he pleaded Guilty. In conſideration of which, and of his poverty, of his having confeſſed his errors in an affidavit, and of his being 70 years of age, and ſome ſymptoms of wildneſs that appeared on his inſpection in court; the court declared, they had mitigated their * intended ſentence to the following, viz. To be impriſoned in Newgate for a month; to ſtand twice in the pillory, with a paper on his forehead, inſcribed Blaſphemy; to be ſent to the houſe of correction, to hard labour, for a year; to pay a fine of 6s. 8d; and to find ſecurity, himſelf in 100l, and two ſureties in 50l each, for his good behaviour during life. *Blackſt. Rep.* 395. *Caſe of Peter Annet.*

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10. All

Navy. 10. All persons in or belonging to his majesty's ships, or vessels of war, being guilty of profane oaths, cursings, execrations, drunkenness, uncleanness, or other scandalous actions, in derogation of God's honour, and corruption of good manners, shall incur such punishment as a court martial shall think fit to impose. 22 G. 2. c. 33. *Art.* 2.

For profane cursing and swearing, see title *Swearing*.

BOOKS.

IF any book shall be taken or otherwise lost out of any parochial library; any justice may grant his warrant to search for it; and if it shall be found, it shall by order of such justice be restored to the library. 7 Ann. c. 14. s. 10.

Books popish. See *Popery*.
Brandy. See *Excise*.
Brass. See *Pewter*.

BREAD.

THE statute of the 31 G. 2. c. 29. repeals all the former laws relating to the assize of bread, and re-enacts the same, with additions and amendments. Which, throughout the whole, is a very regular and judicious act; so that the author hath nothing more to do than to abridge the same in the order as it stands: not being able, in point of method, to alter it for the better.

Power to set the assize. 1. To the intent that a plain and constant rule and method may be duly observed, in making and assizing of the several sorts of bread which shall be made for sale, in any place where an assize shall be thought proper to be set; it * is enacted, that it shall be lawful for the court, or for the person or persons herein authorized to set the assize of bread, to set or ascertain in any place within their jurisdiction, the assize and weight of all sorts of bread which shall be made for sale, or exposed to sale, and the price to be paid for the same, when and as often as they shall think proper. 31 G. 2. c. 29. s. 2.

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2. And

2. And therein reſpect ſhall be had to the price, which the grain, meal, or flour ſhall bear, in the market or markets in or near to the places for which ſuch aſſize ſhall be ſet. *id.* *In proportion to the price of corn.*

3. And making reaſonable allowance to the bakers for their charges, labour and profit, as they ſhall deem proper. *id.* *Allowance to the bakers.*

4. Where an aſſize ſhall be thought proper to be ſet, no perſon ſhall make for ſale, or ſell, or expoſe to or for ſale, any ſort of bread, except wheaten and houſhold, (otherwiſe brown bread), and ſuch other ſorts of bread as ſhall be allowed in the aſſize: but where it hath been uſual to make, or the perſons ſetting the aſſize ſhall allow the making of bread, with the meal or flour of rye, barley, oats, beans, or peaſe, or of any ſuch different ſorts of grain mixed together; the ſame may be there made and ſold accordingly: And if any perſon ſhall offend in the premiſſes, and be convicted thereof by confeſſion or oath of one witneſs, before any magiſtrate or juſtice within the limits of their juriſdiction; he ſhall forfeit not exceeding 40s, nor leſs than 20s. ſ. 3. *Penalty of diſobeying the aſſize.*

5. And in every place where an aſſize ſhall be thought proper to be ſet; the aſſize and weight of the ſeveral ſorts of bread which ſhall be there made, ſhall be ſet according to the following tables: *Tables of aſſize.*

TABLE I.

Of the assize and price of bread made of *Wheat*.

Price of the bushel of wheat and baking.		Weight.				Price.									
		The penny loaf.				Quartern loaf.				Half peck.				Peck loaf.	
		Wheaten		Housh.		Wheaten		Housh.		Wheaten		Housh.		Wheaten		Housh.	
s.	d.	oz.	dr.	oz.	dr.	oz.	dr.	s.	d.	s.	d.	s.	d.	s.	d.	s.	d.
2	9	22	4	29	4	0	3¼	0	2¼	0	6¼	0	4¾	1	0½	0	9½
3	0	20	4	27	1	0	3½	0	2½	0	7	0	5¼	1	1¾	0	10¼
3	3	18	9	25	4	0	3¾	0	2¾	0	7½	0	5½	1	3	0	11
3	6	17	6	23	3	0	4	0	3	0	8	0	6	1	4	1	0
3	9	16	6	21	6	0	4¼	0	3¼	0	8½	0	6½	1	5	1	1
4	0	15	4	20	4	0	4½	0	3½	0	9	0	6¾	1	6¼	1	1¾
4	3	14	4	19	1	0	4¾	0	3¾	0	9¾	0	7½	1	7½	1	2½
4	6	13	9	17	15	0	5	0	3½	0	10¼	0	7½	1	8½	1	3½
4	9	12	12	17	1	0	5½	0	4	0	10¼	0	8	1	9¾	1	4¼
5	0	12	1	16	6	0	5¾	0	4¼	0	11½	0	8½	1	11	1	5
5	3	11	9	15	7	0	6	0	4½	1	0	0	9	2	0	1	6
5	6	11	2	4	10	0	6¼	0	4¾	1	0½	0	9½	2	1	1	7
5	9	10	8	14	4	0	6½	0	5	1	1¼	0	9¾	2	2½	1	7½
6	0	10	2	13	9	0	7	0	5¼	1	1¾	0	10¼	2	3½	1	8½
6	3	9	11	13	1	0	7½	0	5½	1	2¼	0	10¾	2	4¾	1	9½
6	6	9	4	12	10	0	7½	0	5½	1	3	0	11	2	6	1	10
6	9	9	0	12	1	0	7¾	0	5¾	1	3½	0	11½	2	7	1	11
7	0	8	11	11	9	0	8	0	6	1	4	1	0	2	8	2	0
7	3	8	7	11	2	0	8¼	0	6¼	1	4½	1	0½	2	9	2	1
7	6	8	3	10	11	0	8½	0	6½	1	5	1	1	2	10	2	2
7	9	7	14	10	6	0	8¾	0	6¾	1	5½	1	1½	2	11¼	2	2¾
8	0	7	10	10	2	0	9½	0	6¾	1	6¼	1	1¾	3	0½	2	3½
8	3	7	5	9	15	0	9½	0	7	1	7	1	2	3	2	2	4
8	6	7	2	9	9	0	9¾	0	7¼	1	7½	1	2½	3	3	2	5
8	9	6	15	9	4	0	10	0	7½	1	8	1	3	3	4	2	6
9	0	6	13	8	15	0	10¼	0	7¾	1	8½	1	3½	3	5	2	7
9	3	6	9	8	12	0	10½	0	8	1	9	1	3¾	3	6¼	2	7¾
9	6	6	7	8	8	0	10¾	0	8¼	1	9¾	1	4¼	3	7¼	2	8¾
9	9	6	4	8	5	0	11	0	8¼	1	10¼	1	4¾	3	8½	2	9½
10	0	6	1	8	2	0	11½	0	8½	1	11	1	5	3	10	2	10

Price of the buſhel of wheat and baking.		Weight.				Price.							
		The penny loaf				Quartern loaf.		Half peck.		Peck loaf.			
		Wheaten		Houſh		Wheaten		Houſh.		Wheaten		Houſh.	
s.	d.	oz.	dr.	s.	d.	s.	d.	s.	d.	s.	d.	s.	d.
10	3	5	15	7	15	0	11¾	0	8¾	1	11½	1	5½
10	6	5	13	7	12	1	0	0	9	2	0	1	6	4	0	3	0
10	9	5	11	7	9	1	0¼	0	9¼	2	0¼	1	6¼	4	1	3	1
11	0	5	9	7	5	1	0½	0	9½	2	1	1	7	4	2	3	2
11	3	5	6	7	3	1	0¾	0	9¾	2	1¾	1	7½	4	3¼	3	2¾
11	6	5	5	7	2	1	1	0	10	2	2¼	1	7¾	4	4½	3	3½
11	9	5	2	6	15	1	1¼	0	10	2	3	1	8	4	5	3	4
12	0	5	1	6	13	1	1¾	0	10¼	2	3½	1	8½	4	7	3	5
12	3	4	15	6	10	1	2	0	10½	2	4	1	9	4	8	3	6
12	6	4	14	6	8	1	2¼	0	10¾	2	4½	1	9½	4	9	3	7
12	9	4	13	6	5	1	2½	0	11	2	5	1	10	4	10	3	8
13	0	4	11	6	4	1	3	0	11½	2	5¾	1	10¼	4	11½	3	8½
13	3	4	9	6	3	1	3¼	0	11¼	2	6½	1	10½	5	1	3	9
13	6	4	8	6	1	1	3½	0	12½	2	7	1	11	5	2	3	0
13	9	4	7	5	15	1	3¾	0	11¾	2	7¼	1	11½	5	3	3	11
14	0	4	5	5	13	1	4	1	0	2	8	2	0	5	4	4	0
14	3	4	4	5	11	1	4¼	1	0¼	2	8½	2	0½	5	5	4	1
14	6	4	3	5	9	1	5	1	0½	2	9	2	1	5	6	4	2

In the firſt column is the price of the buſhel of wheat *Wincheſter* meaſure, from 2s 9d, to 14s 6d a buſhel, the allowance of the magiſtrates or juſtices to the baker for baking being included; and in the next two columns are the *weights* of the ſeveral loaves: Then in the other columns are the *prices*. So that, for example, if the price of wheat is 5s a buſhel, and the magiſtrates allowance is 6d to the baker for baking; then oppoſite to 6s 6d in the firſt column, will be found the weight and prices of the ſeveral loaves.

And as the weight of the penny loaf is here only ſpecified, the weight of larger loaves may be eaſily aſcertained by addition; as for example, a twopenny loaf (when wheat is at the ſame rate) is twice as much as the penny loaf, the fixpenny loaf ſix times as much, and the eighteen penny loaf eighteen times as much.

Note, the wheaten loaves are three fourths of the weight of the houſhold loaves; and if the magiſtrates or juſtices ſhall think fit to allow any of the white loaves of the price of one penny or two

pence, they are to weigh three fourths of the weight of the wheaten loaves of the ſame price.

*240 * And note, that the prices of the houſhold loaves are always three fourths of the prices of the wheaten loaves; and where it ſhall be thought proper to allow of half-quartern loaves, the prices of ſuch loaves (if ſold ſingly) are to be half a farthing higher than is allowed by this table, when it ſhall ſo happen that the farthing is ſplit.

And magiſtrates and juſtices being to ſet the aſſize and fix the price of the ſeveral loaves of bread, having reſpect to the price which the grain, meal, or flour, of which the ſame are made, ſhall bear in the market; but no proviſion being made how they ſhall know what price the reſpective ſorts of meal and flour ſhould be eſteemed to bear, in proportion to the price of wheat; they are therefore to take notice, that the peck loaf of each ſort of bread is to weigh when well baken, 17lb. 6 oz. averdupois weight (which conſiſts of 16 drachms to the ounce, and 16 ounces to the pound), and the reſt in proportion; and that every ſack of meal or flour is to weigh 2 cwt. and 2 qrs. neat; and that from every ſack of meal or flour there ought to be produced, on the average 20 ſuch peck loaves of bread; and, by obſerving the ſaid rule, magiſtrates and juſtices may at all times know if the baker hath more or leſs than the allowance they intend to give him.

TABLE II.

Of the aſſize and price of bread made of the ſeveral grains here under mentioned.

This table is divided into three columns. Column 1. contains the prices of the buſhel of grain, the allowance for baking included; which prices are adapted ſo as to ſerve either for the *Wincheſter* buſhel of rye, barley, oats, beans, maſlin, (otherwiſe miſcellany, conſiſting of two thirds wheat and one third rye); the price of either of which buſhels in the market being known, the magiſtrates are to add the intended allowance thereto; the amount of which being found in column 1. the weight which the loaves ought to be will be found under the column N°. 2. and the price of the reſpective peck loaves (which are to weigh 17lb. 6 oz. each) under N°. 3.

Example: When the price of the buſhel of barley in the market, with the allowance to the baker is 4s, look for that ſum in column 1, and under their reſpective titles in the ſame line will be found
*241 the weights which the * ſeveral aſſize barley loaves ſhould be of, and the price of the peck barley loaf; and ſo of each of the other ſorts.

Note, where bread is allowed at any time to be made for ſale, of peaſe only; the aſſize and price thereof are to be ſet and fixed from the bean columns: and where bread is ordered to be made for ſale, of a coarſe ſort of maſlin or miſcellany grain, conſiſting of one third rye, one third barley, and one third either peaſe or beans, the aſſize and price thereof are to be ſet and fixed from the barley columns.

Note alſo, that this table is framed for bread to be made of the whole produce of the ſaid ſeveral grains, except the bran or hull thereof only.

No. 1.

Price of the bushel and baking	
s.	d.
1	0
1	3
1	6
1	9
2	0
2	3
2	6
2	9
3	0
3	3
3	6
3	9
4	0
4	3
4	6
4	9
5	0
5	3
5	6
5	9
6	0
6	3
6	6
6	9

No. 2.

Weight of the penny loaf.

Rye.		Barley.		Oats.		Beans.		Maſlin.	
oz.	dr.	oz.	dr.	oz.	dr.	oz.	dr.	oz.	dr.
62	8	67	8	31	4	83	12	70	0
50	0	54	0	25	0	67	0	56	0
41	10	45	0	20	14	55	12	46	10
35	11	38	9	17	14	47	14	40	0
31	4	33	12	15	10	41	14	35	0
27	13	30	0	13	14	37	4	31	2
25	0	27	0	12	8	33	8	28	0
22	11	24	9	11	6	30	7	25	6
20	13	22	8	10	7	27	14	23	5
19	4	20	12	9	10	25	12	21	8
17	13	19	4	8	15	23	15	20	0
16	11	18	0	8	5	22	5	18	10
15	10	16	14	7	13	20	15	17	8
14	12	15	14	7	6	19	11	16	8
13	14	15	0	6	15	18	10	15	9
13	2	14	4	6	9	17	11	14	12
12	8	13	8	6	4	16	12	14	0
11	14	12	14	5	15	15	15	13	5
11	5	12	4	5	11	15	3	12	11
10	13	11	12	5	7	14	9	12	2
10	6	11	4	5	3	13	15	11	10
10	0	10	13	5	0	13	6	11	3
9	10	10	6	4	13	12	14	10	12
9	8	10	0	4	10	12	6	10	6

No. 3.—Price of the peck loaf.

Rye.		Barley.		Oats.		Beans.		Maſlin.	
s.	d.	s.	d.	s.	d.	s.	d.	s.	d.
0	4½	0	4¼	0	9	0	3¼	0	4
0	5½	0	5¼	0	11	0	4	0	5
0	6½	0	6¼	1	1¼	0	5	0	6
0	7¾	0	7¼	1	3¼	0	5¾	0	7
0	8¾	0	8¼	1	5¾	0	6¾	0	8
0	10	0	9¼	1	7¼	0	7½	0	9
0	11	0	10½	1	10	0	8¼	0	10
1	0	0	11½	2	1	0	9¾	0	11
1	1	1	0½	2	2½	0	10	1	0
1	2¼	1	1½	2	4¼	0	10¾	1	1
1	3¼	1	2¾	2	6½	0	11¾	1	2
1	4½	1	3¾	2	8¾	1	0½	1	3
1	5¾	1	4¾	2	11¼	1	1¼	1	4
1	6¾	1	5¾	3	0¾	1	2¼	1	5
1	8	1	7	3	2½	1	3	1	6
1	8¾	1	8	3	5¼	1	3¾	1	7
1	10	1	9	3	8	1	4¾	1	8
1	11¼	1	10	3	11	1	5¾	1	9
2	0¼	1	11	4	1	1	7½	1	10
2	1¼	2	0	4	3	1	7¾	1	11
2	2¾	2	1	4	5½	1	8¾	2	0
2	3¾	2	2	4	7¼	1	8¾	2	1
2	5	2	3	4	9	1	9½	2	2
2	6	2	4	5	0¼	1	10¼	2	3

Every

6. Every aſſize which ſhall be ſet, in any city, town corporate, hundred, diviſion, liberty, rape, or wapen take, ſhall be ſet in averdupois weight, and not troy weight; and in the proportions directed by the ſaid tables, or as near as may be; and the ſaid tables ſhall extend as well to ſuch bread which ſhall be made of the flour of wheat mixed with the flour of other grain, as alſo to bread which ſhall be made with the flour of other grain than wheat, which ſhall be publickly allowed in any place to be made into bread; and the aſſize of all ſuch mixed bread ſhall be ſet as near as may be according to the ſaid tables. ſ. 5. *Aſſize to be ſet in averdupois weight.* *243

7. The prices which the ſeveral kinds of grain, meal, and flour, allowed to be made into bread, ſhall *bona fide* ſell for in the markets or places in *London*, where ſuch grain, meal, and flour ſhall be publickly ſold during the whole market, and not at particular times thereof, or on particular contracts only, ſhall from time to time be given in and certified on oath, on ſome certain day in every week, as the court of mayor and aldermen ſhall appoint, by the meal weighers of the ſaid city or ſuch other perſons as the ſaid court ſhall direct; and ſhall alſo, on ſome certain day in every week to be appointed by the ſaid court, be entered by ſuch meal weighers or other perſons to be appointed as aforeſaid, in writing under their hands, in ſome book for that purpoſe to be provided by the ſaid city, and kept at the town-clerk's office. And the next day after every ſuch price ſhall be ſo given in and certified, the aſſize and weight of all ſorts of bread to be ſold or expoſed to ſale, and the price to be paid for the ſame, ſhall from time to time be ſet by the ſaid court, if then ſitting; if not, then by the mayor of the ſaid city. And the aſſize ſo ſet ſhall take place from ſuch time as the ſaid court ſhall order, and be in force for the ſaid city of *London* and the liberties thereof and the weekly bills of mortality (the city of *Weſtminſter* and liberties thereof, the borough of *Southwark*, and weekly bills of mortality in the county of *Surry* excepted) until a new or other aſſize in *London* ſhall be ſet. And after the ſetting of every ſuch aſſize by the ſaid court, or by the mayor when the ſaid court ſhall not ſit, the aſſize ſo ſet ſhall, with all convenient ſpeed be made publick, in ſuch manner as the ſaid court ſhall direct. But before any advance or reduction ſhall in any week be made by the ſaid court or mayor, in the price of bread; the meal weighers or ſuch other perſons as aforeſaid appointed to make return of the prices of grain, meal, and flour, ſhall leave in writing * at the common hall of the company of bakers, a copy of every return ſo made and entred by them as aforeſaid, ſome time of the ſame day on which they ſhall make the ſaid return and entry: to the intent that the ſaid company may, in the morning of the next day after every ſuch return and entry ſhall be made, and before any aſſize ſhall be ſet, have an opportunity to offer to the ſaid *Prices of grain how to be certified in London.* *244

ſaid court or mayor reſpectively, all ſuch objections as they ſhall think fit, againſt any advance or reduction being that day made. ſ. 6.

How in other cities and towns corporate.

8. The court of mayor and aldermen of every other city where there ſhall be any ſuch court, and when ſuch court ſhall ſit; and where there ſhall be no ſuch court, or being any ſuch, when the ſame ſhall not ſit, the mayor, bailiffs, or other chief magiſtrate or magiſtrates of every ſuch other reſpective city, and in towns corporate, or boroughs, the mayor, bailiffs, aldermen, or other chief magiſtrate or magiſtrates of every ſuch town corporate or borough; or two juſtices in ſuch towns and places where there ſhall be no ſuch mayor, bailiffs, aldermen, or chief magiſtrates; ſhall and may from time to time as there ſhall be occaſion, cauſe the reſpective prices which the ſeveral ſorts of grain, meal, and flour (fit to make the different ſorts of bread allowed there) ſhall *bona fide* ſell for in the reſpective publick markets in or near to ſuch place, during the whole market, and not at particular times thereof, or on particular contracts only, to be given in to them and certified upon oath, in ſuch manner, and by ſuch perſons, and on ſuch day in every week, as they ſhall reſpectively appoint. And the price which ſhall be ſo certified, ſhall be entred by the perſons who ſhall certify the ſame, in books to be provided and kept by them for that purpoſe. And within two days after every ſuch price ſhall be ſo returned, the aſſize and weight of bread for ſuch place, and the price to be paid for the ſame, ſhall be ſet by ſuch court or magiſtrates reſpectively as aforeſaid. And the aſſize ſo ſet ſhall commence on ſuch day in every week, and be in force for ſuch time not exceeding ſeven days from the ſetting of ſuch aſſize, as ſuch court or magiſtrates reſpectively ſhall direct. ſ. 7.

How in places within counties at large.

9. If two juſtices of counties at large, ridings, or diviſions, ſhall at any time think fit to ſet an aſſize of bread, for any place within the limits of their juriſdiction; in ſuch caſe, it ſhall be lawful for ſuch two juſtices, to cauſe the price which grain, meal, and flour (fit to make the ſeveral ſorts of bread that ſhall be made for ſale in any ſuch place) ſhall *bona fide* ſell for in
*245 the * reſpective publick corn market or markets in or near any ſuch place, during the whole market, and not at any particular times thereof, or on ſpecial contracts only, to be given and certified on oath to them at their reſpective places of abode, on ſuch day in every week as they ſhall appoint, by the clerks of the market or markets in or near ſuch places, or ſuch other perſon as they ſhall for that purpoſe appoint. And the price ſo returned ſhall be entred by the perſons ſo returning the ſame in books to be provided by them and kept for that purpoſe. And within two days after ſuch return, the aſſize may be by them ſet for every ſuch place, for any time not exceeding 14 days from the ſetting thereof. And the aſſize ſo ſet from time to time, ſhall commence and

and be in force at ſuch time after every ſuch ſetting thereof, and be made publick in ſuch places for which the ſame ſhall be ſo ſet, in ſuch manner as the juſtices who ſet the ſame ſhall direct. ſ. 8.

Bakers may inſpect the certificate.

10. Any maker of bread for ſale in any ſuch other city, town corporate, borough, or place, where the aſſize ſhall at any time be thought proper to be ſet, ſhall have liberty at all ſeaſonable times, in the day-time, the next day after ſuch returns ſhall be made and entred as aforeſaid, to ſee the ſaid entry, without paying any thing for the ſame; to the intent every ſuch maker of bread for ſale may have an opportunity on the ſaid next day after ſuch entry made as aforeſaid, to offer to any ſuch court, mayor, bailiffs, aldermen, or other chief magiſtrate or magiſtrates, or juſtices as aforeſaid, who ſhall think fit to ſet ſuch aſſize within their reſpective juriſdiction, and before any ſuch aſſize ſhall be ſet, ſuch objections as he can reaſonably make againſt any advance or reduction to be made in ſuch aſſize ſo to be ſet as aforeſaid. ſ. 9.

Bakers to pay no fee for the aſſize.

11. No baker of bread for ſale ſhall be liable to pay any fee, gratuity, or reward, to any perſon for or by means of any aſſize to be ſet. ſ. 10.

Form of the returns to be made.

12. The form of the return or certificate ſhall be to the effect following.

The prices of grain, meal, and flour, as ſold in the corn market in ——— in the ——— of ——— the ——— day of ———.

The beſt wheat at ———	by the buſhel.
The ſecond at ———	by ditto.
The third at ———	by the buſhel.
The beſt wheaten flour at ———	by the ſack.
* Houſhold flour at ———	by the ſack.
Rye at ———	by the buſhel.
Rye meal or flour at ———	by ditto.
Barley at ———	by ditto.
Barley meal at ———	by ditto.
Oats at ———	by ditto
Oatmeal at ———	by ———
White peaſe at ———	by the buſhel.
White pea flour or meal at ———	by ———
Beans at ———	by the buſhel.
Bean meal or flour at ———	by ———

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To every of which returns the perſons appointed to make the ſame ſhall ſign their names or marks. ſ. 11.

Form of publication of the assize.

13. When an assize shall be set, the same shall be made publick in the form or to the effect following:

——*To wit,* } The assize of bread set the —— day of —— for —— to take place on the —— day of —— now next ensuing, and to be in force —— for the said —— of ——.

And in places where penny, two-penny, six-penny, twelve penny, and eighteen penny loaves, shall be made, as followeth:

	lb.	oz.	dr.
The penny loaf wheaten is to weigh —			
Ditto household is to weigh ——			
The two-penny loaf wheaten is to weigh			
Ditto household is to weigh ——			
The six-penny loaf wheaten is to weigh			
Ditto household is to weigh ——			
The twelve-penny loaf wheaten is to weigh —— ——			
Ditto household is to weigh —— ——			
The eighteen-penny loaf wheaten is to weigh —— ——			
Ditto household is to weigh —— ——			

*247 * And in places where quartern, half-peck, and peck loaves be made, then as follows:

	lb.	oz.	dr.		s.	d.
The peck loaf wheaten is to weigh				and is to be sold for		
Ditto household is to weigh				and is to be sold for		

And the half peck and quarter of a peck loaves of wheaten and household bread are to weigh in proportion to the weight a peck loaf of wheaten or household bread ought to weigh; and to be sold accordingly in proportion. And when any bread shall be ordered to be made with the meal or flour of rye, barley, oats, peafe, or beans,

beans, either alone or mixed with the meal or flour of any other grain; the aſſize of ſuch bread ſhall be made publick, in ſuch manner as the magiſtrates or juſtices, who ſhall ſet ſuch aſſize, ſhall from time to time direct. ſ. 12.

Bread of different denominations not to be allowed at the ſame time.

14. In places where any ſix-penny, twelve-penny, and eighteen-penny loaves ſhall be allowed to be made or ſold, no peck, half peck, or quarter of a peck loaves ſhall be allowed at the ſame time to be made or ſold; to the intent that one of thoſe ſorts of loaves may not be ſold, deſignedly or otherwiſe, for the other ſort thereof, to the injury of unwary people: on pain that every one offending in the premiſſes ſhall forfeit not exceeding 40s, nor leſs than 20s. as the magiſtrate or juſtice before whom ſuch offender ſhall be convicted ſhall think fit. ſ. 13.

Hundreds may be divided for ſetting the aſſize.

15. If the juſtices of any county, riding, or diviſion, ſhall in their ſeſſions think fit to aſcertain, that any hundred or other place within ſuch diviſion ought to be eſtimated as of or in any one particular hundred, riding, or diviſion of any ſuch county, riding, or diviſion, in order that the aſſize of bread which ſhall be ſet for ſuch particular hundred or place may extend to or comprize ſuch other hundred or place; in ſuch caſe, it ſhall be lawful for them ſo to do: but by ſo doing thereof, no juſtice of any ſuch county, riding, or diviſion ſhall be excluded from acting as a juſtice in any hundred, riding, or diviſion of any ſuch county, in which any ſuch particular towns, diſtricts, or places ſhall lie, or the aſſize for them ſhall be ſet. ſ. 14.

Clerk of the market to keep books.

* 16. An entry ſhall be made from time to time by the clerk of the market, or other perſon appointed to make return as aforeſaid, in a book to be provided and kept by him, of every return by him made; and alſo of the rate at which the price, aſſize, and weight of bread ſhall be ſet within his juriſdiction: which book any inhabitant may at all ſeaſonable times in the day inſpect without fee. ſ. 15. *248

Aſſize not to be altered till the price of corn alters 3d a buſhel.

17. After the aſſize ſhall be ſet no alteration ſhall be made therein in any ſubſequent week, either to riſe or ſink the ſame, except when the price of wheat or other grain ſhall be returned as having riſen or fallen 3d a buſhel ſince the laſt return, no proviſion being made by the aſſize tables for altering any aſſize, when the variation in the price ſhall not have amounted to, and been returned 3d a buſhel. ſ. 16.

Puniſhment of officers for default.

18. If any meal weigher, clerk of the market, or other perſon appointed to make returns as aforeſaid, ſhall neglect, omit, or refuſe to do any thing by this act required to be done by him, or ſhall deſignedly or knowingly make any falſe return; or if any conſtable or other peace officer ſhall refuſe or neglect to obey any warrant, in writing delivered to him under the hand and ſeal of any

magiſtrate or juſtice, or to do any other act requiſite to be done by him for carrying this act into execution; he ſhall forfeit not exceeding 5l, nor leſs than 20s. ſ. 17.

Buyer or ſeller to diſcloſe the price of corn.

19. If any buyer or ſeller of or dealer in corn, grain, meal, or flour, on reaſonable requeſt to him made by the meal weighers of the city of *London*, or by the clerks of the market or other perſon reſpectively appointed to make returns as aforeſaid; ſhall refuſe to diſcloſe and make known to them the true real prices which the ſeveral ſorts of grain, meal and flour ſhall be *bona fide* bought at or ſold by or for him, at any corn market, or other place where corn, grain, meal, or flour is uſually openly or publickly ſold; or ſhall knowingly give in any falſe or untrue price, or which hath been made by any deceitful means; he ſhall, on conviction thereof by confeſſion, or oath of one witneſs, or affirmation of a quaker, forfeit not more than 10l, nor leſs than 40s. ſ. 18.

Magiſtrates may ſend for them.

20. If any court, magiſtrate, or juſtices, who ſhall have ordered any return to be made as aforeſaid, ſhall within three days after ſuch return ſuſpect, that the ſame was not truly and *bona fide* made; they may ſummon before them any perſon who ſhall have bought or ſold, or agreed to buy or ſell any grain, meal or flour
*249 within * their reſpective juriſdictions, or who ſhall be thought to be likely to give any information concerning the premiſſes; and may examine them upon oath, touching the rates and prices, which the ſeveral ſorts of grain, meal and flour, or any of them, were really and *bona fide* bought at or ſold for, or agreed ſo to be, by him at any time within ſeven days preceding ſuch ſummons. And if any perſon ſo ſummoned ſhall neglect or refuſe to appear (proof of ſuch ſummons being made upon oath); or if any perſon ſo ſummoned ſhall appear, and neglect or refuſe to anſwer ſuch lawful queſtions touching the premiſſes as ſhall be propoſed to him, without ſome juſt or reaſonable excuſe to be allowed by ſuch court, magiſtrate, or juſtices; he ſhall on conviction by oath of one witneſs, or by confeſſion, forfeit not exceeding 10l, nor leſs than 40s. And if any perſon ſo examined, ſhall wilfully forſwear himſelf, he ſhall ſuffer as in caſes of perjury.—Provided, that the party ſummoned be not obliged to travel above five miles from the place of his abode. ſ. 19.

Baker of bread made of other grain than wheat ſhall conform to the aſſize.

21. Whenever any court, magiſtrate, or juſtices as aforeſaid, ſhall order any bread to be made with the flour or meal of any other grain than wheat, or to be mixed with the flour of wheat, or to be made with the flour or meal of any other ſorts of grain, either ſeparate or mixed together; all perſons who ſhall make any bread for ſale, in any place where ſuch order ſhall be made, ſhall make bread with ſuch mixed or other grain, in ſuch manner, and of ſuch weight and goodneſs, and ſhall ſell the ſame at ſuch prices, as ſuch court, magiſtrate,

giſtrate, or juſtices reſpectively ſhall direct: on pain of forfeiting not more than 5l, nor leſs than 40s. ſ. 20.

22. The ſeveral ſorts of bread which ſhall be made for ſale, or ſold, or expoſed to or for ſale, ſhall always be well made, and in their ſeveral and reſpective degrees, according to the goodneſs of the ſeveral ſorts of meal or flour whereof the ſame ought to be made; and no allum, or preparation or mixture in which allum ſhall be an ingredient, or any other ingredient or mixture whatſoever, (except only the genuine meal or flour which ought to be put therein, and common ſalt, pure water, eggs, milk, yeaſt, and barm, or ſuch leaven as ſhall be allowed to be put therein by thoſe who have ſet the aſſize, and where no aſſize ſhall be ſet, then ſuch leaven as any magiſtrate or juſtice within his juriſdiction ſhall allow to be uſed in making of bread) ſhall be put into, or in anywiſe uſed in making dough, or any bread to be ſold, or as or for leaven to ferment any dough, or on any other account, * in the trade or myſtery of making bread, under any colour or pretence whatſoever; on pain that every perſon (other than a ſervant or journeyman) who ſhall knowingly offend in the premiſſes, and ſhall be convicted (A) thereof by confeſſion, or oath of one witneſs, before any ſuch magiſtrate or juſtice reſpectively, ſhall forfeit not more than 10l, nor leſs than 40s; or ſhall by warrant of ſuch magiſtrate or juſtice be apprehended and committed to the houſe of correction, or ſome priſon of the county, city, town corporate, borough, riding, diviſion, or place, where the offence ſhall have been committed, or the offender ſhall be apprehended, there to remain and be kept to hard labour, for any time not exceeding one calendar month, nor leſs than ten days from the time of ſuch commitment, as ſuch magiſtrate or juſtice ſhall think fit. And if any ſervant or journeyman baker ſhall knowingly offend in the premiſſes, and be convicted thereof as aforeſaid; he ſhall forfeit not more than 5l, nor leſs than 20s; or ſhall in like manner be committed to the houſe of correction or priſon as aforeſaid. And it ſhall be lawful for the magiſtrate or juſtice, before whom ſuch offender ſhall be convicted, out of the money forfeited, when recovered, to cauſe the offender's name, place of abode, and offence, to be publiſhed in ſome news paper, which ſhall be printed or publiſhed in or near the county, city, or place, where any ſuch offence ſhall have been committed. ſ. 21. *True making of bread.* * 250

23. No perſon ſhall knowingly put into any corn, meal, or flour, which ſhall be ground, dreſſed, bolted, or manufactured for ſale, either at the time of grinding, dreſſing, bolting, or in anywiſe manufacturing the ſame, or at any other time, any ingredient, mixture, or other thing whatſoever; or ſhall knowingly ſell, offer, or expoſe to ſale any meal or flour of any ſort of grain, as or for the meal or flour of any other ſort of grain, or any thing as or for or mixed with the meal of flour of any grain which ſhall not be the real and genuine meal or flour of the grain the ſame ſhall import *Adulterating meal.*

port to be and ought to be; on pain of forfeiting, not more than 5l, nor leſs than 40s. ſ. 22.

Undue mixtures of meal.

24. No perſon ſhall knowingly put into any bread which ſhall be made for ſale, any mixture of meal or flour of any other ſort of grain than of the grain the ſame ſhall import to be, and ſhall be allowed to be made of, in purſuance of this act; or ſhall put into any bread which ſhall be made for ſale, any larger or other proportion of any other or different ſort of grain, or the meal or flour thereof, than what ſhall be appointed or allowed to be put therein by
*251 * this act; or any mixture or thing as, for, or in lieu of flour, which ſhall not really be the genuine flour the ſame ſhall import to be and ought to be; on pain of forfeiting, not more than 5l, nor leſs than 20s. ſ. 23.

Penalty for deficiency in weight.

25. If any perſon who ſhall make any bread for ſale, or who ſhall ſend out, or ſell, or expoſe to or for ſale, any bread which ſhall be deficient in weight, according to the aſſize which ſhall be ſet for the ſame; he ſhall forfeit (B) not exceeding 5s, nor leſs than 1s, for every ounce wanting in the weight every ſuch loaf ought to be of; and for every loaf which ſhall be found wanting leſs than an ounce, ſhall forfeit not exceeding 2s 6d, nor leſs than 6d, as ſuch magiſtrate or juſtice before whom ſuch bread ſhall be brought ſhall think fit: ſo as ſuch bread which ſhall be complained of for wanting weight, in any city, town corporate, borough, liberty, or franchiſe having juriſdiction thereof, or within the weekly bills of mortality, ſhall be brought before ſome magiſtrate, or juſtice having juriſdiction in the premiſſes, and weighed before him, within 24 hours after the ſame ſhall have been baked, ſold, or expoſed to ſale; and ſo as ſuch bread which ſhall be complained of for wanting weight, in any hundred, riding, diviſion, liberty, rape, wapentake, or place, ſhall be brought before ſome juſtice within ſuch juriſdiction and weighed before him within three days after the ſame ſhall have been baked, ſold, or expoſed to ſale; unleſs it be made out to the ſatisfaction of ſuch magiſtrate or juſtice, on the behalf of the party complained of, that ſuch deficiency in weight wholly aroſe from ſome unavoidable accident in baking, or otherwiſe, or was occaſioned by ſome contrivance or confederacy. ſ. 24.

Mark.

26. Every perſon who ſhall make for ſale, or ſell, or expoſe, or ſend out to or for ſale, any ſort of bread whatſoever, ſhall cauſe to be fairly marked on every loaf made, ſold, carried out, or expoſed to ſale as wheaten bread, a large roman W; and upon every loaf made, ſold, carried out, or expoſed to ſale as houſhold or brown bread, a large roman H; on pain of forfeiting for every loaf not ſo marked, not more than 20s, nor leſs than 5s, (except as to ſuch loaves which ſhall be raſped after the beſpeaking or purchaſing thereof, by the

the particular desire of any person who shall order the same to be rasped for his own use). s. 25.

27. No baker or other person shall ask or take, for any bread which he shall sell or expose to sale, any greater price than such bread shall be ascertained to be sold at by the * assize as aforesaid; and no baker, or other person who shall make any bread for sale, shall refuse or decline to sell any loaf or loaves of any of the sorts of bread which in pursuance of this act shall be allowed or ordered to be made, to any person who shall tender ready money in payment for the same, at the price set for the same by the assize, when such person shall have any loaf in his possession to be sold, more than shall be requisite for the immediate necessary use of his family or his customers, and which it shall be incumbent on such baker or other person complained of to prove before the magistrate or justice to whom such complaint shall be made, if thereunto required by the party complaining; on pain of forfeiting for every such offence, not more than 40s, nor less than 10s. s. 26. *Penalty for selling for a greater price than is set by the assize.* * 252

(And by the 2 & 3 Ed. 6. c. 15. If any baker shall conspire not to sell bread but at certain prices; every such person shall forfeit 10l for the first offence; and if not paid in six days, he shall be imprisoned twenty days, and have only bread and water for his sustenance; for the second offence 20l, or the pillory; and for the third offence 40l, or the pillory, and loss of an ear, and to become infamous. And the sessions or leet may hear and determine the same).

28. No person shall sell or offer to sale any bread of an inferior quality to wheaten bread, at a higher price than household bread shall be set at by the assize; on pain of forfeiting (being convicted thereof by confession, or oath of one witness, before one magistrate or justice) the sum of 20s. s. 27. *Bread inferior to wheaten shall not be sold for a higher price than household.*

29. It shall be lawful for any magistrate or justice, or for any peace officer authorized by warrant of such magistrate or justice, at seasonable times in the day time, to enter into any house, shop, stall, bakehouse, warehouse, or outhouse, of or belonging to any baker or seller of bread, to search for, view, weigh, and try all or any the bread, which shall be there found: And if any bread, on any such search, shall be found to be wanting either in the goodness of the stuff whereof it shall be made, or to be deficient in the due baking or working thereof, or shall be wanting in the due weight, or not truly marked, or shall be of any other sort of bread than shall be allowed to be made by virtue of this act; any such magistrate, justice, or peace officer may seize the same; and such magistrate or justice may dispose thereof, as he in his discretion shall think fit, for the better carrying of this act into execution. s. 28. 32 G. 2. c. 18. s. 2. *Houses may be entered to search for bread.*

30. If

*253 *Mills and other places may be entered to ſearch for adulterated meal.*

* 30. If information ſhall be given on oath, to any magiſtrate or juſtice, that there is reaſonable cauſe to ſuſpect, that any miller who grinds any grain for toll or reward, or any perſon who doth dreſs, bolt, or in anywiſe manufacture any meal or flour for ſale, or any maker of bread for ſale, doth mix up with, or put into any meal or flour ground or manufactured for ſale, any mixture, ingredient, or thing whatſoever, not the genuine produce of the grain ſuch meal or flour ſhall import and ought to be, or whereby the purity of any meal or flour in the poſſeſſion of any ſuch miller, mealman, or baker ſhall be in anywiſe adulterated; it ſhall be lawful for any ſuch magiſtrate or juſtice, and alſo for any peace officer authorized by the warrant of ſuch magiſtrate or juſtice, at all ſeaſonable times in the day-time, to enter into any houſe, mill, ſhop, bakehouſe, ſtall, bolting-houſe, paſtry, warehouſe, or outhouſe, of or belonging to any ſuch miller, mealman, or baker, and to ſearch and examine whether any mixture, ingredient, or thing, not the genuine produce of the grain ſuch meal or flour ſhall import or ought to be, ſhall have been mixed up with or put into any meal or flour in the poſſeſſion of any ſuch miller, mealman or baker, either in the grinding of any grain at the mill, or in the dreſſing, bolting, or manufacturing thereof, or whereby the purity of any meal or flour ſhall be in anywiſe adulterated: And if on ſuch ſearch it ſhall appear, that any offence hath been committed in any place allowed to be ſearched as aforeſaid; it ſhall be lawful for any magiſtrate, juſtice, or officer, authorized as aforeſaid, to ſeize any meal or flour which ſhall be deemed on ſuch ſearch to have been adulterated, and all mixtures and ingredients which ſhall be found and deemed to have been uſed or intended to be uſed for ſuch adulteration; and ſuch thereof as ſhall be ſeized by ſuch peace officer ſhall, with all convenient ſpeed, be carried to ſome magiſtrate or juſtice: And if any magiſtrate or juſtice, who ſhall make any ſeizure in purſuance of this act, or to whom any thing ſeized ſhall be brought, ſhall adjudge that any mixture, or ingredients, not the genuine produce of the grain any ſuch meal or flour which ſhall have been ſo ſeized ſhall import and ought to be, ſhall have been put into any ſuch meal or flour, or that the purity of any ſuch meal or flour ſo ſeized was adulterated by any mixture or ingredient put therein; in ſuch caſe, every ſuch magiſtrate or juſtice is hereby required to diſpoſe of the ſame, as he in his diſcretion ſhall think proper. 31 G. 2. c. 29. ſ. 29.

*254 *Penalty of having in poſſeſſion unlawful ingredients.*

* 31. Every miller, mealman, baker, or ſeller of bread as aforeſaid, in whoſe houſe, mill, ſhop, bakehouſe, ſtall, bolting houſe, paſtry, warehouſe, outhouſe, or poſſeſſion, any mixture or ingredient ſhall be found, which ſhall be adjudged by any magiſtrate or juſtice to have been lodged there with an intent to have adulterated the purity of meal, flour,

flour, or bread, ſhall on conviction by confeſſion, or oath of one witneſs before any ſuch magiſtrate or juſtice, forfeit not exceeding 10l, nor leſs than 40s, unleſs the party charged with ſuch offence ſhall make it appear to the ſatisfaction of ſuch magiſtrate or juſtice, that ſuch mixture or ingredient was not brought or lodged where the ſame was ſeized, with deſign to have been put into any meal or flour, or to have adulterated the purity thereof; but that the ſame was there for ſome other lawful purpoſe. And it ſhall be lawful for ſuch magiſtrate or juſtice, out of the forfeiture when recovered, to cauſe the offender's name, place of abode, and offence, to be publiſhed in ſome news-paper printed or publiſhed in or near the county, city, or place, where ſuch offence ſhall have been committed. ſ. 30.

Penalty of obſtructing ſearch.

32. If any perſon ſhall obſtruct or hinder ſuch ſearch, or the ſeizure of any bread or ingredients as aforeſaid; he ſhall forfeit not exceeding 5l, nor leſs than 20s. ſ. 31.

Perſon intereſted not to act as a magiſtrate.

33. No perſon who ſhall follow or be concerned in the buſineſs of a miller, mealman, or baker, ſhall act as a magiſtrate or juſtice in the execution of this act; on pain of 50l, to him who will inform and ſue for the ſame in any court of record at *Weſtminſter*. ſ. 32.

Journeyman offending.

34. If any perſon who ſhall follow the trade of a baker, ſhall make complaint to any magiſtrate or juſtice, and make appear to him by the oath of any credible witneſs, that any offence which he hath been charged with, and for which he ſhall have paid any penalty by this act, ſhall have been occaſioned by the wilful neglect or default of any journeyman or other ſervant employed by him; ſuch magiſtrate or juſtice ſhall iſſue his warrant to bring ſuch journeyman or ſervant before himſelf or any magiſtrate or juſtice of the place where the offender can be found; and on his being apprehended and brought before ſuch magiſtrate or juſtice, the ſaid magiſtrate or juſtice ſhall examine into the matter of ſuch complaint, and on proof thereof upon oath ſhall under his hand adjudge and order what reaſonable ſum ſhall be paid by ſuch journeyman or ſervant to his maſter, by way of recompence for the money he ſhall have paid by reaſon of the wilful neglect or default of ſuch journeyman or ſervant. And if he * ſhall neglect or refuſe, on conviction, to pay immediately, * 255
ſuch magiſtrate or juſtice ſhall commit him to the houſe of correction, or ſome other priſon, of the place where he ſhall be apprehended or convicted, to be kept to hard labour not exceeding one calendar month, unleſs payment thereof ſhall be made after ſuch commitment, and before the expiration of the ſaid term of one calendar month. ſ. 33.

Manner of convicting offenders.

35. It ſhall be lawful for the mayor of *London*, or any alderman thereof, within the ſaid city or liberties; and for one juſtice within the ſeveral counties, ridings, diviſions, cities, towns corpo-

rate, boroughs, liberties, or jurisdictions; to hear and determine, in a summary way, all offences against this act; and for that purpose to summon before him the party accused; and if he shall not appear, or offer some reasonable excuse for his default, then on oath made of the offence by one witness, such magistrate or justice shall issue his warrant for apprehending the offender: And on appearance of the party accused; or if he shall not appear, on notice being given to or left for him at his usual place of abode; or if he cannot be apprehended on a warrant granted against him as aforesaid; such magistrate or justice shall proceed to inquire of the offence, and to examine any witness or witnesses who shall be offered on either side upon oath; and shall convict or acquit the party accused: And if the penalty, on such conviction, shall not be paid within 24 hours after such conviction; such magistrate or justice shall issue his warrant directed to any peace officer to make distress; and if any offender shall convey away his goods out of the jurisdiction of such magistrate or justice, or so much thereof that the penalty cannot be levied, then some magistrate or justice within whose jurisdiction the offender shall have removed his goods shall back the said warrant, and thereupon the penalty shall be levied by distress; and if within five days the forfeiture shall not be paid, the distress shall be appraised and sold, rendring the overplus after deducting the forfeiture and the costs and charges of the prosecution, distress, and sale; which charges shall be ascertained by the magistrate or justice before whom the offender was convicted, or who backed the warrant, if either of them shall continue alive, and if not, then by some other magistrate or justice where the offender was convicted; and for want of such distress, every such magistrate or justice within whose jurisdiction such offender shall reside or be, shall on application of the prosecutor, and proof made of the conviction and * non-payment of the penalty and charges, commit such offender to the common gaol or house of correction of the division or place where the offender shall be found, there to remain for one calendar month from the time of such commitment, unless payment shall be sooner made. s. 34.

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And if it shall be made out on oath, to the satisfaction of any magistrate or justice, that any one is likely to give material evidence on behalf of the prosecutor or of the person accused, and will not voluntarily appear to be examined; such magistrate or justice shall issue his summons to convene such witness before him, at such reasonable time as in such summons shall be fixed: And if any persons so summoned shall neglect or refuse to appear, and no just excuse shall be offered for such neglect or refusal, then (after proof upon oath of such summons) such magistrate or justice shall issue his warrant to bring such witness before him; and if on his appearance, or on being brought before such magistrate or justice, he shall refuse to be examined on oath, without offering any just excuse for such refusal, such magistrate or justice may commit him to the public prison of the county, city, or other division, in which the person so refusing to be examined shall be, there to remain

main not exceeding 14 days, nor less than three, as such magistrate or justice shall direct. s. 35.

36. And the conviction shall be in the form or to the effect following: *Form of the conviction.*

——— *To wit.* *BE it remembered, that on this* ——— *day of* ——— *in the* ——— *year of the reign of* ——— A. O. *is convicted before me one of his majesty's justices of the peace for the said county of* —— *for* ——— *and I do adjudge him to pay and forfeit for the same the sum of* ———.

Given under my hand and seal the day and year aforesaid. s. 36.

37. By a general clause in this same act, s. 34. All penalties and forfeitures, when recovered, shall be paid to the informer. *Application of the forfeitures.*

But by the 32 G. 2. c. 18. Such of the penalties by the aforesaid act, as thereby are not *particularly* disposed of, shall be one moiety thereof, where any offender shall be convicted by confession, or oath of one witness, to him who shall inform and prosecute; and the other moiety thereof, and also all penalties and forfeitures incurred on the weighing, trying, or seizure of any bread by any magistrate or justice, shall be applied for the better carrying * the said act into execution, as such magistrate or justice shall think fit. s. 2. *257

38. No certiorari shall be granted, to remove any conviction, or other proceeding had thereupon. 31 G. 2. c. 29. s. 37. *Certiorari.*

39. If any person convicted shall think himself aggrieved, he may appeal to the next sessions, *Appeal.* and the execution shall in such case be suspended; such person convicted entring into recognizance, at the time of the conviction, with two sufficient sureties, in double the sum which he shall have been adjudged to forfeit, upon condition to prosecute such appeal with effect, and to be forth-coming to abide the judgment and determination of the justices at the said sessions, who shall finally determine the matter of the said appeal, and award such costs as to them shall appear just and reasonable, to be paid by either party: and if the conviction shall be affirmed, the appellant shall immediately pay down the sum adjudged, together with such costs as the justices in their said sessions shall award; and in default of payment thereof, any two such justices, or any one magistrate or justice having jurisdiction in the place to which such appellant shall escape or where he shall reside shall commit him to the common gaol of the county, city, division, or place, where he shall be apprehended, until he shall make payment of such penalty and of the costs and charges which shall be adjudged on the conviction, to the informer: But if the appellant shall be discharged, reasonable costs shall be awarded to him against the informer, who would in case of such conviction have been intitled to a share of the penalty; and

which coſts ſhall and may be recovered by the appellant againſt ſuch informer, in like manner as coſts given at the ſeſſions are recoverable. ſ. 38.

Provided, that if the conviction ſhall be within ſix days before the ſeſſions, the party on entring into ſuch recognizance as aforeſaid, ſhall be at liberty to appeal, either to the then next, or to the next following ſeſſions. ſ. 39.

Indemnity of perſons proſecuted for any thing done on this act.

40. Every action which ſhall be brought againſt any magiſtrate, juſtice or peace officer, for any thing done under this act, ſhall be commenced within ſix months, and laid in the proper county; and the act of the 24 G. 2. c. 44. ſhall extend to ſuch magiſtrate or juſtice acting under this act. And no action ſhall be commenced againſt ſuch peace officer, till ſeven days after notice in writing ſhall have been given to or left for him at his uſual place of abode by the proſecutor's attorney; which notice ſhall contain the name and place of
*258 abode of the perſon * intending to bring ſuch action, and alſo of his attorney, and likewiſe the cauſe of action: and ſuch peace officer may within the ſaid ſeven days tender ſatisfaction; and if the ſame is not accepted, the defendant may plead ſuch tender in bar of the action, together with the general iſſue or any other plea with leave of the court; and if the jury ſhall find the amends tendred to have been ſufficient, or if the plaintiff ſhall be nonſuit, or diſcontinue, or judgment be given for the defendant upon demurrer, or if the action be brought after the time limited, or not within the proper county, the jury ſhall find for the defendant, and he ſhall be intitled to his coſts; but if the jury ſhall find, that no ſuch tender was made, or not ſufficient, or ſhall find againſt the defendant on any plea pleaded, they ſhall give a verdict for the plaintiff, and ſuch damages as they ſhall think proper, and the plaintiff ſhall thereupon recover his coſts againſt ſuch defendant. ſ. 40.

And other perſons ſued for any thing done on this act, may plead the general iſſue; and if they recover ſhall have treble coſts. ſ. 41.

Limitation of actions.

41. Provided always, that no perſon ſhall be convicted for any of the aforeſaid offences, unleſs the proſecution be commenced within three days after the offence committed. ſ. 42.

Saving of the right of others.

42. Provided alſo, that nothing herein ſhall extend to prejudice any right or cuſtom of the city of *London*; or of the lord of any leet; or clerk of the market; or the dean of *Weſtminſter*, or high ſteward of *Weſtminſter* or his deputy; or of the univerſities. ſ. 43, 44, 45.

Note, the reaſon why the indemnifying ſtatute of the 24 G. 2. c. 44. is here particularly mentioned, ſeems to be upon the account of ſuch magiſtrates or chief officers who are empowered to act in ſetting the aſſize, and otherwiſe carrying this act into execution, that

that are not juſtices of the peace; as for inſtance, the court of mayor and aldermen, in moſt of the boroughs and towns corporate, conſiſteth of perſons ſome of whom are not juſtices; and in others, eſpecially the more ancient, not one of them is a juſtice of the peace, (the corporation having been eſtabliſhed before there were any juſtices of the peace in the kingdom:) but yet they are enabled ſpeedily to proceed in this and in many other inſtances by act of parliament. Which obſervation is applicable alſo to the power herein given to them, to iſſue precepts, to examine upon oath, and the like; which power is implied in the general office of a juſtice of the peace, but is not applicable to thoſe others, without ſpecial words granting the ſame. * So alſo it was neceſſary for the act to be particular, with regard to the indemnification of conſtables and others acting under ſuch warrants; as alſo of the meal weighers, clerks of the market, and others appointed to make returns of the price of grain, flour, and the like, who are not under the general protection of the law for their proceedings in theſe matters, and therefore require an expreſs declaration in the act itſelf, of their authority and privilege in this reſpect. *259

Proceedings where the aſſize hath not been ſet.

43. All that hath been ſaid above, as to the price and weight of bread, and the like, proceeds upon the ſuppoſition of an aſſize being ſet. By the 3 G. 3. c. 11. regulations are made altho' no aſſize is ſet, and further proviſions are enacted as followeth:

No loaf or loaves of bread, called or deemed aſſize loaf or loaves in the table of the aſſize and price of bread in the act of the 31 G. 2. and the weight of which varies according to the variation in the price of grain, ſhall be made for or expoſed to ſale, in any place where loaves called prized loaves in the ſaid tables ſhall be allowed to be ſold at the ſame time; that is to ſay, no aſſize loaves of the price of three pence and prized loaves called half quartern loaves, nor aſſize loaves of the price of ſix pence and prized loaves called quartern loaves, nor aſſize loaves of the price of twelve pence and prized loaves called half peck loaves, nor aſſize loaves of the price of eighteen pence and prized loaves called peck loaves, ſhall at the ſame time in any place be made for or expoſed to ſale, to the end that unwary perſons may not be impoſed on by buying aſſize loaves for prized loaves, or prized loaves for aſſize loaves; on pain that every perſon offending ſhall forfeit not exceeding 40s, nor leſs than 10s. ſ. 1.

And the juſtices in their general, quarter, or petty ſeſſions, may from time to time appoint, which of the ſorts of aſſize or prized loaves, and what other ſorts of bread, and what ſorts of grain, ſhall be allowed to be made and ſold within their juriſdiction or any part thereof; their order to be entred in a book, which may be inſpected by the makers of bread for ſale at all ſeaſonable times of the day without fee; and they ſhall cauſe a copy thereof to be put up in ſome market or other public town of the place, or elſe to be inſerted

ſerted in ſome public news-paper circulated there.—Provided, that the juſtices ſhall not at any time allow the making for ſale or ſelling any ſorts of aſſize bread made of the flour of wheat, other than wheaten and houſhold bread, and loaves of white bread of the price of two pence or under. ſ. 2, 3.

*260 * And every maker of bread for ſale ſhall obſerve the ſame proportion as to weight, as where the aſſize is ſet; that is to ſay, every white loaf of the price of 2d or under, ſhall weigh three parts in four of the weight of the wheaten loaf of the like price; and every wheaten aſſize loaf, of whatever price the ſame ſhall be, ſhall weigh three parts in four of the weight of every houſhold aſſize loaf of the like price; and every houſhold aſſize loaf, ſhall weigh one third part more than a wheaten aſſize loaf of the like price; on pain of forfeiting not exceeding 40s. ſ. 4.

And every peck, half peck, quarter of a peck, and half quarter of a peck loaf, made for ſale of the flour of wheat, and called *Wheaten Bread*, ſhall be ſold in proportion to each other, as to price; and the like, as to loaves of *Houſhold Bread*, which ſhall be ſold proportionably to each other, and for one fourth leſs than *Wheaten Bread* of the ſame denomination; on pain of forfeiting for every loaf, not exceeding 40s, nor leſs than 10s. ſ. 5.

And the weight of every ſort of bread made for ſale ſhall be in averdupois weight as follows: Every peck loaf, ſeventeen pounds ſix ounces; half peck loaf, eight pounds eleven ounces; quarter of a peck loaf, four pounds five ounces and a half; half quarter of a peck loaf, two pounds two ounces and three quarters; on pain of forfeiting for every ounce wanting not exceeding 5s, nor leſs than 1s, and for leſs than an ounce not exceeding 2s 6d, nor leſs than 6d; ſo as the ſame in any city, town corporate, or within the bills of mortality, be brought before a juſtice and weighed before him within 24 hours after the ſame ſhall have been baked or found in any perſon's cuſtody for ſale, and elſewhere within three days;—unleſs it be made out to the ſatisfaction of ſuch juſtice, that the deficiency in weight wholly aroſe from ſome unavoidable accident, or was occaſioned by ſome contrivance or confederacy. ſ. 6.

And no perſon ſhall ſell or offer to ſale any bread of an inferior quality to wheat bread, at an higher price than houſhold bread; on pain of forfeiting not exceeding 20s. ſ. 7.

Every wheaten loaf ſhall be marked with a large Roman W; houſhold with a large Roman H; and if any perſon ſhall ſell or offer to ſale any ſuch loaf unmarked (except as to ſuch loaves which ſhall be raiſed by the deſire of the purchaſer for his own uſe); he ſhall forfeit for every ſuch loaf, not exceeding 40s, nor leſs than 10s, unleſs it ſhall appear to the ſatisfaction of the juſtice to whom com-

*261 plaint * ſhall be made, that the not marking aroſe from ſome unavoidable accident, or was occaſioned by ſome contrivance or confederacy. ſ. 8.

And bread made of any other grain than wheat ſhall be marked with ſome letter or letters not more than two, as the juſtices in their

their general, quarter, or ſpecial ſeſſions ſhall order, which order ſhall be entred in a book, unto which the bakers may reſort in the day time without fee; and the juſtices ſhall cauſe a copy thereof to be put up in ſome market or other publick town or place within the diviſion, or otherwiſe to be inſerted in ſome publick news-paper uſually circulated there: And if the juſtices ſhall neglect to make ſuch order, then the baker ſhall mark every ſuch loaf with any two diſtinct capital letters as he ſhall think fit. And every perſon who ſhall make or have in his cuſtody for ſale any ſuch loaf made of other grain than wheat, which ſhall not be ſo marked, ſo as the ſame may on view thereof be aſcertained under what denomination it was made (except ſuch loaves as ſhall be raſped by the deſire of the purchaſor for his own uſe); ſhall forfeit not exceeding 40s, nor leſs than 5s, for every loaf not ſo marked ſ. 9.

And it ſhall be lawful for any juſtice, or peace officer authorized by warrant of ſuch juſtice, to enter into any houſe, ſhop, ſtall, bakehouſe, warehouſe, outhouſe, or other place, of or belonging to any baker or ſeller of bread; and to ſearch, view, weigh, and try all or any bread which ſhall be there found: And if any bread ſhall, on any ſearch or trial by any juſtice, or on proof made before him by the oath of one witneſs, be found to be deficient in weight, or not truly marked, or deficient in the due baking or working thereof, or wanting in the goodneſs of the ſtuff, or made with any mixture of meal or flour of any other grain than the ſame ſhall import to be made with, or with any larger or other proportion of any other grain than what ought to be put therein, or with any mixture or ingredient which by the aforeſaid act ought not to put therein, or with any thing in lieu of flour which ſhall not be the genuine flour the ſame ſhall import to be, or made with any leaven not allowed by the ſaid former act; ſuch juſtice or peace officer may ſeize the ſame, and diſpoſe thereof to poor perſons as to ſuch juſtice ſhall ſeem fit; and the maker or ſeller, whoſe bread ſhall be found wanting in the goodneſs of the ſtuff, or made with ſuch undue mixture as aforeſaid, or undue proportion, or made with any thing in lieu of flour which ſhall not be the genuine flour the ſame ſhall import to be, or * with any leaven not allowed by * 262
the ſaid act, ſhall forfeit not exceeding 5l, nor leſs than 20s; unleſs the default ſhall appear to have wholly ariſen from ſome unavoidable accident, or ſome contrivance or confederacy. ſ. 10.

And if any perſon, ſhall obſtruct or oppoſe any ſuch ſearch, or ſeizure of ſuch bread; he ſhall forfeit not exceeding 40s, nor leſs than 20s. ſ. 11.

And no perſon, who ſhall follow or be concerned in the buſineſs of a miller, mealman, or baker, ſhall be capable of acting as a juſtice in the execution of this act; and if he ſhall preſume ſo to do, he ſhall forfeit 50l, to him who ſhall inform or ſue for the ſame. ſ. 12.

Provided, that if ſuch baker ſhall make it appear to any ſuch juſtice, that any offence for which he ſhall have paid the penalty,

was

was occaſioned by the neglect or default of his journeyman or ſervant; the ſaid juſtice ſhall iſſue his warrant for bringing ſuch offender before him or ſome other juſtice; and, on conviction, ſuch juſtice ſhall order what reaſonable ſum ſhall be paid by the ſaid offender by way of recompence; and if he do not immediately pay the ſame, the ſaid juſtice ſhall commit him to the houſe of correction or other priſon of the place where he ſhall be apprehended, there to be kept to hard labour for any time not exceeding one calendar month, unleſs payment be ſooner made. ſ. 13.

And one juſtice may hear and determine offences in like manner as by the ſaid former act. ſ. 14, 15.

And no certiorari ſhall be granted, to remove any conviction or other proceedings had thereupon. ſ. 17.

With like liberty of appeal as by the ſaid former act. ſ. 18, 19.

And perſons convicted on this act, ſhall not be proſecuted for the ſame offence under any other law. ſ. 23.

And all penalties and forfeitures on this act ſhall go, half to the informer, and half as the juſtice ſhall order for carrying this act into execution. ſ. 24.

Finally, it is provided, that nothing herein ſhall extend to the univerſities. ſ. 25.

Concerning ſtandard wheaten bread.

44. By the 13 G. 3. c. 62. Whereas by the 31 G. 2. c. 29. and 3 G. 3. c. 11. only two ſorts of bread made of wheat are allowed to be made for ſale, that is to ſay, Wheaten and Houſhold; and whereas according to the ancient order and cuſtom of the realm there hath been from time immemorial a STANDARD WHEATEN BREAD, being the whole produce of the wheat whereof it was made: it is therefore enacted, that from henceforth a bread made of the flour of wheat, which flour, without * any mixture or diviſion, ſhall be the whole produce of the grain, the bran or hull thereof only excepted, and which ſhall weigh three fourth parts of the weight of the wheat whereof it ſhall be made, may be made and ſold, and ſhall be called and underſtood to be a *ſtandard wheaten bread.* ſ. 1.

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And the maker ſhall mark every loaf thereof with the capital letters S. W. and the ſame may be made and ſold, altho' no aſſize be ſet, of the weight and in the proportions following; viz. That every ſtandard wheaten peck loaf ſhall weigh 17lb 6 oz averdupois; every half peck loaf 8lb 11oz; and every quartern loaf 4lb 5½oz: And every peck loaf, half peck loaf, and quartern loaf ſhall always be ſold as to price in proportion to each other reſpectively: And that when wheaten and houſhold bread, made as the law directs, ſhall be ſold at the ſame time, together with this ſtandard wheaten bread, they be ſold in reſpect of and in proportion to each other as followeth: namely, That the ſame weight of wheaten bread, which coſts 8d, the ſame weight of this ſtandard wheaten bread ſhall coſt 7d, and the ſame weight of houſhold bread ſhall coſt 6d, or ſ

ſtandard wheaten aſſized loaves ſhall weigh equal to 8 wheaten aſſized loaves, or to 6 houſhold aſſized loaves of the ſame price, as near as may be. ſ. 2.

Provided, that the ſaid ſtandard wheaten bread ſhall not be made into or expoſed to ſale as prized loaves, at one and the ſame time, together with aſſized loaves of the ſame ſtandard wheaten bread. ſ. 3.

And the magiſtrates may, whenever they think proper, fix the aſſize of this ſtandard wheaten bread, according to the following tables:

TABLE I.

Or the ASSIZE table of ſtandard wheaten bread.

The firſt column contains the price of the buſhel of wheat, Wincheſter meaſure, from 2s 9d to 14s 6d the buſhel, the allowance of the magiſtrates to the baker included: The other columns contain the *weight* of the ſeveral loaves.

Price of the buſhel of wheat and baking.	Small Bread.			Large Aſſize Bread.					
	Penny.		Two Pence.	Sixpence.		Twelve Pence.		Eighteen Pence.	
s. d.	oz.	dr.	lb. oz. dr.	lb. oz. dr.		lb. oz. dr.		lb. oz. dr.	
2 9	25	4	3 2 9	9 7 11		18 15 5		28 7 0	
3 0	23	3	2 14 5	8 11 0		17 6 1		26 1 1	
3 3	21	6	2 10 12	8 0 5		16 0 11		24 1 0	
3 6	19	14	2 7 12	7 7 3		14 14 5		22 5 8	
3 9	18	9	2 5 1	6 15 4		13 14 7		20 13 11	
4 0	17	6	2 2 12	6 8 4		13 0 9		19 8 13	
4 3	16	6	2 0 11	6 2 2		12 4 4		18 6 7	
4 6	15	7	1 14 4	5 12 11		11 9 6		17 6 1	
4 9	14	10	1 13 4	5 7 13		10 15 10		16 7 7	
5 0	13	14	1 11 13	5 3 7		10 6 13		15 10 4	
5 3	13	4	1 10 8	4 15 7		9 14 14		14 14 5	
5 6	12	10	1 9 4	4 11 13		9 7 11		14 3 8	
5 9	12	1	1 8 3	4 8 9		9 1 1		13 9 10	
6 0	11	9	1 7 3	4 5 8		8 11 1		13 0 9	
6 3	11	2	1 6 4	4 2 12		8 5 8		12 8 3	
6 6	10	11	1 5 6	4 0 3		8 0 5		12 0 8	
6 9	10	5	1 4 10	3 13 13		7 11 9		11 9 6	
7 0	9	15	1 3 14	3 11 9		7 7 3		11 2 12	
7 3	9	9	1 3 3	3 9 8		7 3 1		10 12 9	
7 6	9	4	1 2 9	3 7 10		6 15 4		10 6 13	
7 9	9	0	1 1 15	3 5 13		6 11 10		10 1 7	
8 0	8	11	1 1 6	3 4 2		6 8 4		9 12 7	
8 3	8	7	1 0 14	3 2 9		6 5 2		9 7 11	
8 6	8	3	1 0 6	3 1 1		6 2 2		9 3 3	

Price of the bushel of wheat and baking.	Small Bread.			Large Assize Bread.					
	Penny.		Two Pence.	Sixpence.		Twelve Pence.		Eighteen Pence.	
s. d.	oz.	dr.	lb. oz. dr.	lb. oz. dr.		lb. oz. dr.		lb. oz. dr.	
8 9	7	15	0 15 14	2	15 11	5	15 5	8	15 0
9 0	7	12	0 15 7	2	14 5	5	12 11	8	11 0
9 3	7	8	0 15 0	2	13 1	5	10 3	8	7 4
9 6	7	5	0 14 10	2	11 14	5	7 13	8	3 11
9 9	7	2	0 14 4	2	10 12	5	5 9	8	0 15
10 0	6	15	0 13 14	2	9 11	5	3 7	7	13 2
10 3	6	13	0 13 9	2	8 11	5	1 6	7	10 1
10 6	6	10	0 13 4	2	7 12	4	15 7	7	7 3
10 9	6	7	0 12 15	2	6 13	4	13 10	7	4 6
11 0	6	5	0 12 10	2	5 15	4	11 13	7	1 12
11 3	6	3	0 12 6	2	5 1	4	10 2	6	15 4
11 6	6	1	0 12 1	2	4 4	4	8 9	6	12 13
11 9	5	15	0 11 13	2	3 8	4	7 0	6	10 8
12 0	5	13	0 11 9	2	2 12	4	5 8	6	8 4
12 3	5	11	0 11 6	2	2 1	4	4 2	6	6 2
12 6	5	9	0 11 2	2	1 6	4	2 12	6	4 2
12 9	5	7	0 10 14	2	0 11	4	1 7	6	2 2
13 0	5	6	0 10 11	2	0 1	4	0 3	6	0 4
13 3	5	4	0 10 8	1	15 8	3	14 15	5	14 7
13 6	5	2	0 10 5	1	14 14	3	13 13	5	12 1
13 9	5	1	0 10 2	1	14 5	3	12 11	5	11 0
14 0	4	15	0 9 15	1	13 13	3	11 9	5	9 6
14 3	4	14	0 9 12	1	13 4	3	10 9	5	7 13
14 6	4	13	0 9 9	1	12 12	3	9 8	5	6 5

TABLE II.

Or the PRICE table of ſtandard wheaten bread.

The firſt column contains the price of the buſhel of wheat, allowance to the baker included: The other columns contain the *prices* of the ſeveral loaves.

Price of the buſhel of wheat and baking	Quartern Loaf.	Half Peck Loaf.	Peck Loaf.	Price of the buſhel of wheat and baking.	Quartern Loaf.	Half Peck Loaf.	Peck Loaf.
s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.
2 9	0 2¾	0 5½	0 11	8 9	0 8¾	1 5½	2 11
3 0	0 3	0 6	1 0	9 0	0 9	1 6	3 0
3 3	3 0¼	0 6½	1 1	9 3	0 9¼	1 6½	3 1
3 6	0 3½	0 7	1 2	9 6	0 9½	1 7	3 2
3 9	0 3¾	0 7½	1 3	9 9	0 9¾	1 7½	3 3
4 0	0 4	0 8	1 4	10 0	0 10	1 8	3 4
4 3	0 4¼	0 8½	1 5	10 3	0 10¼	1 8½	3 5
4 6	0 4½	0 9	1 6	10 6	0 10½	1 9	3 6
4 9	0 4¾	0 9½	1 7	10 9	0 10¾	1 9½	3 7
5 0	0 5	0 10	1 8	11 0	0 11	1 10	3 8
5 3	0 5¼	0 10½	1 9	11 3	0 11¼	1 10½	3 9
5 6	0 5½	0 11	1 10	11 6	0 11½	1 11	3 10
5 9	0 5¾	0 11½	1 11	11 9	0 11¾	1 11½	3 11
6 0	0 6	1 0	2 0	12 0	1 0	2 0	4 0
6 3	0 6¼	1 0½	2 1	12 3	1 0¼	2 0½	4 1
6 6	0 6½	1 1	2 2	12 6	1 0½	2 1	4 2
6 9	0 6¾	1 1½	2 3	12 9	1 0¾	2 1½	4 3
7 0	0 7	1 2	2 4	13 0	1 1	2 2	4 4
7 3	0 7¼	1 2½	2 5	13 3	1 1¼	2 2½	4 5
7 6	0 7½	1 3	2 6	13 6	1 1½	2 3	4 6
7 9	0 7¾	1 3½	2 7	13 9	1 1¾	2 3½	4 7
8 0	0 8	1 4	2 8	14 0	1 2	2 4	4 8
8 3	0 8¼	1 4½	2 9	14 3	1 2¼	2 4½	4 9
8 6	0 8½	1 5	2 10	14 6	1 2½	2 5	4 10

And

* And the bakers and ſellers of the ſaid ſtandard wheaten bread *267
ſhall be liable to all the penalties of the former acts; Provided, that if any information be laid againſt a baker, for making, marking, or expoſing to ſale any bread purporting to be the ſtandard wheaten bread aforeſaid, made of flour, not being the whole produce of the wheat, the bran or hull thereof only excepted, and weighing three fourth parts of the weight of the wheat whereof it was made, and ſhall prove that he bought the ſaid flour, as and for ſuch flour, of the miller or mealman, naming his name and place of abode; in ſuch caſe, the baker ſhall be acquitted, and the miller or mealman ſhall forfeit as in the caſe of adulterating corn, meal, or flour, by the ſaid act of 31 G. 2. ſ. 5, 6.

And when the magiſtrates have ſet the aſſize of the ſaid ſtandard wheaten bread; they may, if they think proper, omit ſetting the aſſize of any other ſort of bread. ſ. 7.

And the juſtices at any general quarter ſeſſions may prohibit for three months (unleſs they ſhall ſee cauſe ſooner to revoke the prohibition, which they may do at any adjourned quarter ſeſſions or any ſpecial ſeſſions) the makers of bread for ſale, for making or expoſing to ſale any other one or more ſorts of bread, purporting to be of a ſuperior quality, and ſold at a higher price, than the ſtandard wheaten bread aforeſaid. Provided, that no ſuch order of prohibition ſhall take place, until one kalendar month at leaſt after the date of the making thereof. And ſuch order ſhall be entred by the ſaid juſtices in a book, to be inſpected by the bakers at all ſeaſonable times in the day time without fee. And the juſtices ſhall cauſe a copy of ſuch order to be put up in ſome market or other publick town within the diſtrict, or ſhall cauſe the ſame to be inſerted in ſome publick news paper publiſhed within ſuch diſtrict. And provided, that the bakers may have an opportunity, whilſt the ſaid prohibition is under conſideration, of offering to the juſtices their objections againſt it. ſ. 8, 9.

Provided alſo, that nothing herein ſhall extend to prevent the magiſtrates or others who have power to ſet the aſſize of bread, from allowing (even during the time of ſuch prohibition as aforeſaid), if they think fit, any white loaves or wheaten loaves of the price of one penny or two pence to be made and ſold, ſo that they be made, marked, and ſold, according to the regulations of the aſſize table of the 31 G. 2. ſ. 10.

And whereas in many places, the inferior claſſes of people are uſed to be ſupplied with bread made of wheat, * of a coarſe and * 268
cheaper ſort than the ſtandard wheaten bread aforeſaid; therefore it ſhall be lawful for the baker to make and ſell ſuch inferior and coarſer bread, provided he ſell the ſame at a price under that of houſhold bread, as directed by the ſaid act of 31 G. 2. (altho' nothing in this act extends to ſetting any aſſize thereon.) But if he ſells ſuch inferior or coarſer bread by weights and prices whereat the houſhold bread aforeſaid is at that time aſſized; he ſhall be liable to the ſame penalties as bakers for any miſdemeanor in making and ſelling any other ſort of bread. ſ. 11, 12.

Provided

Provided always, that nothing herein ſhall extend to prejudice any right or cuſtom of the city of London, or the dean of the collegiate church of Weſtminſter, or the high ſteward of the city of Weſtminſter, or either of the two univerſities. ſ. 14, 17.

A. Information of an undue mixture uſed in making of bread; on the 31 G. 2. c. 29. ſ. 21.

Weſtmorland. *BE it remembred, that this ——— day of ——— in the ——— year of the reign of ——— at ——— in the ſaid county,* A. I. *yeoman, in his proper perſon, exhibiteth to me* J. P. *eſquire, one of his majeſty's juſtices of the peace for the ſaid county, a complaint and information, and thereby informeth me, that* A. O. *late of ——— in the county aforeſaid, baker, on the ——— day of ———* [Here ſpecify the time of the offence, that the proſecution may appear to be commenced within three days after the offence committed, according to the 42d ſection of the aforeſaid ſtatute] *did put into and uſe, in the making of bread to be ſold, a preparation or mixture in which allum was an ingredient, contrary to the form of the ſtatute in ſuch caſe made and provided; whereby the ſaid* A. O. *hath forfeited a ſum of money, not exceeding* 10*l. nor leſs than* 40*s; and thereupon the ſaid* A. I. *prayeth the judgment of me the ſaid juſtice in that behalf, and that he the ſaid* A. I. *may have one moiety of the ſaid forfeiture, according to the form of the ſtatute in ſuch caſe made; and that the ſaid* A. O. *may be ſummoned to anſwer the premiſſes before me the ſaid juſtice.*

Summons thereupon.

Weſtmorland. } To the conſtable of ———

* 269 *WHEREAS complaint and information hath been exhibited before me* J. P. *eſquire, one of his majeſty's * juſtices of the peace for the ſaid county, by* A. I. *yeoman, that* A. O. *late of ——— in the county aforeſaid, baker, on the ——— day of ——— in the ——— year of the reign of ——— did put into and uſe, in the making of bread to be ſold, a preparation or mixture in which allum was an ingredient, contrary to the form of the ſtatute in ſuch caſe made and provided: Theſe are therefore to require you forthwith to ſummon the ſaid* A. O. *to appear before me at ——— on the ——— day of ——— at the hour of ——— in the forenoon of the ſame day, then and there*

to

to anſwer to the ſaid information; And be you then there, to certify what you ſhall have done in the premiſſes. Herein fail you not. Given under my hand and ſeal, the ——— day of ——— in the year aforeſaid.

If the party ſhall not appear on ſuch ſummons, or offer ſome reaſonable excuſe for his default; then on oath made of the offence by one witneſs, ſuch juſtice ſhall iſſue his *warrant* (mutatis mutandis) *to apprehend the offender, and bring him before the ſaid juſtice,* to anſwer the ſaid information.

On the party's appearance; or if he do not appear, then on proof of the ſummons being given to him or left at his uſual place of abode; or if he cannot be apprehended by warrant as aforeſaid; the juſtice may proceed to hear and determine the offence.

The form of the conviction, by the words of the ſtatute, ſhall be as follows.

Weſtmorland, to wit. *BE it remembered, that on this ——— day of ——— in the ——— year of the reign of ——— A. O. is convicted before me* J. P. *eſquire, one of his majeſty's juſtices of the peace for the ſaid county, for putting into and uſing in the making of bread to be ſold, a preparation or mixture in which allum was an ingredient: And I do adjudge him to pay and forfeit for the ſame, the ſum of five pounds. Given under my hand and ſeal the day and year aforeſaid.*

Warrant of diſtreſs, on non-payment of the penalty within 24 hours after his conviction.

Weſtmorland. } To the conſtable of ———

FORASMUCH as A. O. *late of ——— in the county aforeſaid, baker, was on the ——— day of ——— duly convicted before me* J. P. *eſquire, one of his majeſty's juſtices of the peace* * *for the ſaid county, by the oath of* A. W. *a credible witneſs, for that the ſaid* A. O. *on the ——— day of ——— did put into and uſe, in the making of bread to be ſold, a preparation or mixture in which allum was an ingredient, againſt the form of the ſtatute in ſuch caſe made and provided; by reaſon whereof, I did adjudge and have adjudged him to pay and* 270

and forfeit for the ſaid offence the ſum of 5l, to be diſtributed as is herein after mentioned: And whereas it appears to me, that the ſaid ſum, or any part thereof, is not yet paid: I do therefore hereby authorize and require you forthwith to make diſtreſs of the goods and chattels of him the ſaid A. O. *and if within the ſpace of five days next after ſuch diſtreſs by you taken, the ſaid ſum of 5l ſhall not be paid, that then you do cauſe the ſaid goods by you ſeized to be appraiſed and ſold; rendring the overplus to him the ſaid* A. O. *after deducting the ſaid ſum of 5l, and alſo the coſts and charges of the proſecution for the ſaid offence, and of the ſaid diſtreſs and ſale; which coſts and charges I do hereby aſcertain at the ſum of 30s. And out of the ſaid ſum of 5l ſo forfeited as aforeſaid, you are to pay one moiety to* A. I. *yeoman, who informed me of the ſaid offence, and proſecuted to conviction him the ſaid* A. O. *before me for the ſame; and the other moiety you are to apply for the better carrying the act of parliament for the due making of bread and for the other purpoſes therein mentioned into execution, according as I ſhall hereafter give you directions: And if ſufficient diſtreſs cannot be had or found whereupon to levy the ſaid ſum of 5l as aforeſaid, you are hereby required to certify the ſame to me together with the return of this precept. Herein fail you not. Given under my hand and ſeal, the ——— day of ——— in the ——— year of the reign of ———.*

Return of the want of diſtreſs, indorſed upon the warrant.

Weſtmorland. I A. C. *conſtable of ——— in the ſaid county, do hereby certify* J. P. *eſquire, one of his majeſty's juſtices of the peace for the ſaid county, that by virtue of this warrant, I have made diligent ſearch for the goods and chattels of the within mentioned* A. O. *and that I can find no ſufficient goods and chattels of him the ſaid* A. O. *whereon to levy the within mentioned ſum of 5l. Witneſs my hand, the ——— day of ——— in the year ———.*

A. C.

Sworn before me the ſaid juſtice,
the day and year aforeſaid:

J. P.

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* Commitment for want of diſtreſs.

Weſtmorland. { To the conſtable of ——— in the ſaid county, and to the keeper of the common gaol at ——— in the ſaid county.

FORASMUCH as A. O. *late of ——— in the county aforeſaid, baker, was on the ——— day of ——— duly convicted before*

before me J. P. *esquire, one of his majesty's justices of the peace for the said county, by the oath of* A. W. *a credible witness, for that he the said* A. O. *on the* ——— *day of* ——— *did put into and use in the making of bread to be sold, a preparation or mixture in which allum was an ingredient, against the form of the statute in that case made and provided; by reason whereof I did adjudge him to pay and forfeit for the said offence the sum of* 5*l. And whereas on the* ——— *day of* ——— *in the year aforesaid, I did issue my warrant to the constable of* —— *to levy the said sum of* 5*l by distress of the goods and chattels of him the said* A. O. *And whereas it appears me, as well upon the oath of the said constable of* ——— *as otherwise, that he the said constable of* —— *hath used his best endeavours to levy the said sum on the goods and chattels of the said* A. O. *as aforesaid, but that no sufficient distress can be found whereon to levy the same: Therefore I do hereby command you the said constable of* ——— *him the said* A. O. *to apprehend and safely convey to the said common gaol, and him to deliver to the keeper thereof aforesaid, together with this precept: And I do hereby command you the said keeper of the gaol aforesaid, to receive into your custody in the said gaol him the said* A. O. *and him there safely to keep for the space of one calendar month from the time of this commitment; unless the said sum of* 5*l, and the costs and charges of the prosecution which I have ascertained at the sum of* ——— *shall be sooner paid. Given under my hand and seal, the* ——— *day of* ——— *in the year aforesaid.*

B. The like process as above may be for bread deficient in weight, beginning the information, which is the ground work of the whole, thus:

THAT A. O. *late of* ——— *in the county aforesaid, baker, on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— *did expose to sale one loaf of household bread importing to be a two penny loaf, deficient in weight one * ounce according to the assize then and there set for the said bread.* *272

And so in other like cases.

Breaking gaol. See *Prison breaking.*
Breaking open doors. See *Arrest.*
Brewers. See *Excise.*

BRIBERY.

BRIBERY in a ſtrict ſenſe is taken for a great miſpriſion of one in a judicial place, taking any thing whatſoever, except meat and drink of ſmall value, of any one who has to do before him any way, for doing his office, or by colour of his office, but of the king only; and is puniſhable at the common law by fine and impriſonment. 1 *Haw. c.* 67.

BRICKS AND TILES.

Duty on Bricks and Tiles. See *Exciſe.*

True making of tiles. 1. BY the 17 Ed. 4. c. 4. Every perſon, uſing the occupation of making of tile called Plain tile (otherwiſe called Thak tile), roof tile or cres tile, corner tile, and gutter tile, ſhall make it good, ſeaſonable, and ſufficient, and well whited and anncaled.

And the earth, whereof any ſuch tiles ſhall be made, ſhall be digged and caſt up before Nov. 1, next before they ſhall be made; and ſtirred and turned before Feb. 1, next following; and not wrought before Mar. 1. next after: and the ſame earth, before it be put to making of tile, ſhall be duly wrought and tried from ſtones.

And the veins called malin or marle, and chalk, lying commonly in the ground near to the land convenient to make tile, after the digging of the ſaid earth whereof any ſuch tile ſhall be made, ſhall be well ſevered from the earth of which the tile ſhall be made.

And every ſuch plain tile ſo to be made ſhall be 10½ inches long, 6¼ inches broad, and half an inch and half a quarter thick:—Roof tile or cres tile, 13 inches long, half an inch and half a quarter
* 273 thick, with convenient * deepneſs: Gutter tile and cover tile 10½ inches long, with convenient thickneſs, breadth, and deepneſs.

And if any perſon ſhall ſet to ſale any ſuch tile otherwiſe made; he ſhall forfeit to the buyer double value of the tile, and make fine and ranſom at the king's will.—To be recovered by action of debt, with coſts.—And alſo the juſtices of the peace and every of them may hear and determine offences againſt this act; who ſhall aſſeſs upon the offender no leſs fine than for every 1000 plain tiles 5s, for

every

every 100 roof tile 6s 8d, and for every 100 corner or gutter tile 2s.

And the ſaid juſtices ſhall have power to call before them or any of them perſons having experience or knowledge in making tile, to ſearch and examine the digging, caſting, turning, parting, making, whiting, and annealing aforeſaid; and no perſon ſhall put any ſuch tile to ſale before it be ſearched, on pain of forfeiture. And if the ſearcher ſhall find any perſons offending againſt this act, they ſhall preſent the defaulters at the next ſeſſions, which ſhall be equal to a preſentment of 12 men. And the ſearcher ſhall have of the tile maker for his labour for every 1000 plain tile ſearched 1d, for every 100 roof tile an halfpenny, and for every hundred corner and gutter tile a farthing. Searcher neglecting his duty ſhall forfeit 10s; and the juſtices may hear and determine the defaults of the ſearchers, in like manner as of the tile makers.

2. By the 17 G. 3. c. 42. All bricks made for ſale, ſhall, when burned, be not leſs than eight inches and an half long, two inches and an half thick, and four inches wide; and all pantiles, not leſs than thirteen inches and an half long, nine inches and an half wide, and half an inch thick: on pain that the maker ſhall forfeit 20s for every 1000 bricks, and 10s for every 1000 pantiles. ſ. 1, 2. [Note, the reaſon why no proviſion was made concerning *pantiles*, among the other ſorts of tiles, by the above mentioned act of the 17 Ed. 4. is, becauſe *pantiles* are a modern invention; long after the date of that act.] *True making of bricks and pantiles.*

And the ſize of the ſieves or ſcreens for ſifting or ſcreening ſea coal aſhes, to be mixed with brick earth in making of bricks, ſhall not exceed one fourth part of an inch between the maſhes. ſ. 3.

3. All combinations for inhancing the price of bricks or tiles ſhall be void; and every brick maker or tile maker offending therein ſhall forfeit 20l, and every clerk, agent, or ſervant, 10l; half to the poor, and half to him who ſhall ſue in ſix calendar months in one of the courts at Weſtminſter. ſ. 4. *Combinations to inhance the price.*

* 4. All other penalties and forfeitures, not herein otherwiſe directed, ſhall be recovered before one juſtice, on proof by confeſſion or oath of one witneſs; to be levied by diſtreſs, and diſtributed half to the informer, and half to the poor of the pariſh where the offender dwells: and if ſufficient diſtreſs ſhall not be found, or ſuch penalties and forfeitures ſhall not be forthwith paid, the juſtice ſhall commit the offender to the common gaol or houſe of correction for the place where the matter ſhall ariſe, for any time not exceeding two calendar months, unleſs ſuch penalties and forfeitures, and all reaſonable charges, ſhall be ſooner paid. ſ. 5. *Penalties.* *274

The conviction to be in this form, or to the like effect:

BE *it remembered, that on the* ——— *day of* ——— *in the year of our Lord* —— A. B. *is convicted before me* C. D. *one of his majeſty's*

majeſty's juſtices of the peace for the ——— *of* ——— (ſpecifying the offence, and the time and place when and where the ſame was committed, as the caſe ſhall be). *Given under my hand and ſeal, the day and year aforeſaid.* ſ. 6.

But no penalty, in reſpect of the dimenſions of bricks or tiles, ſhall be recovered, unleſs the information ſhall be laid within one calendar month after ſale or delivery of the bricks or tiles. ſ. 7.

Appeal. 5. Perſons aggrieved may, within four calendar months after the cauſe of complaint ſhall have ariſen, appeal to the general quarter ſeſſions, giving 21 days notice at the leaſt, in writing, to the perſon or perſons whoſe acts are complained againſt; and within eight days after ſuch notice entring into recognizance before a juſtice with two ſureties, conditioned to try ſuch appeal at, and abide the order of, and pay ſuch coſts as ſhall be awarded by the court. And the juſtices at ſuch ſeſſions, on proof of ſuch notice and recognizance, ſhall hear and determine the appeal in a ſummary way, and award ſuch coſts to the party appealing or appealed againſt, as they ſhall think reaſonable: And their determination ſhall be concluſive; and no order or other proceedings in the premiſſes ſhall be quaſhed for want of form, or removed by *certiorari* or other proceſs into any of his majeſty's courts of record at *Weſtminſter*. ſ. 8.

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*275 *BRIDGES.

NOTE; This title treateth only of county bridges: Thoſe which are under the cognizance of the ſurveyor of the highways, as being repaired by the ſeveral pariſhes or diſtricts, are treated of under the title *Highways*.

I. Who ſhall repair.
II. Power of the leet to inquire thereof.
III. Power of the juſtices in ſeſſions.
IV. Concerning the 300 foot at the end of bridges.
V. Indictment of bridges.
VI. Charges of repairing.
VII. Surveyors of the work.
VIII. Manner of repairing.
IX. Purchaſing lands adjoining.
X. Contracting for a term of years.

I. Who

BRIDGES

I. *Who ſhall repair.*

1. By the great charter, 9 H. 3. c. 15. *No town nor freeman ſhall be diſtrained to make bridges, nor banks, but ſuch as of old time and of right have been accuſtomed.*

And none can be compelled to make new bridges, where never any were before, but by act of parliament. 2 *Inſt.* 701.

2. By the common law, ſome perſons (ſpiritual or temporal, corporate or not corporate) are bound to repair bridges by reaſon of the *tenure* of their lands or tenements; and ſome by reaſon of *preſcription* only:

By *tenure*, by reaſon that they and thoſe whoſe eſtate they have in the lands or tenements, are bound in reſpect thereof to repair the ſame. 2 *Inſt.* 700.

By reaſon of *preſcription only*: but herein there is a diverſity between bodies politick or corporate, ſpiritual or temporal, and natural perſons: for the bodies politick or corporate, ſpiritual or temporal, may be bound by uſage and preſcription only, becauſe they are local and have a ſucceſſion perpetual; but a natural perſon cannot be bound by act of his anceſtor, without a lien, or binding, and aſſets. 2 *Inſt.* 700.

3 If a man make a bridge for the common good of all the ſubjects, he is not bound to repair it; for no * particular man is bound to reparation of bridges by the common law, but by tenure or preſcription. 2 *Inſt.* 701. * 276

And if none are bounden by tenure or preſcription at common law, then the whole county or franchiſe ſhall repair it. 2 *Inſt.* 701.

E. 10 G. 3. *K.* and the inhabitants of the *Weſt Riding* of the county of *York*. The caſe was, there was an ancient foot bridge over *Gluſburne* beck in the ſaid Weſt Riding, and a ford for horſes, and another for carriages; being in the king's common highway, leading from *Otley* to *Colne* in the county of *Lancaſter*. The inhabitants of *Gluſburne* had always repaired the ſaid foot bridge. In the year 1743, the inhabitants of *Gluſburne* aforeſaid, being deſirous of having a bridge for carts and carriages over the ſaid ſtream, applied for aſſiſtance to the ſeſſions for the ſaid Weſt Riding; and thereupon the juſtices ordered the ſum of 10l to be iſſued for that purpoſe, with a proviſo, that the ſame ſhould not be conſtrued to extend to charge the inhabitants of the ſaid Riding, in time to come, with the reparation of the ſaid bridge or any part thereof. In purſuance whereof, the inhabitants of *Gluſburne* aforeſaid pulled down the ancient foot bridge, and ſold the materials thereof, and received the money for the ſame, and built a bridge, about ſixty yards higher up the ſtream, in the ſame highway, for foot paſſengers, horſes, carts, and carriages. Which bridge ſo built was of publick utility and uſed conſtantly afterwards by all perſons paſſing that road, till the year 1767, when the ſame was carried

carried away by a flood. And the queſtion was, Whether the inhabitants of the ſaid Weſt Riding were obliged to rebuild the ſaid bridge. And, in behalf of the ſaid Riding, a caſe was cited from 1 *Roll's Abr.* 368. which is as follows: "If a man erects a mill for "his own profit, and makes a new cut for the water to come to "it, and makes a new bridge over it, and the ſubjects uſe to go "over this as over a common bridge; this bridge ought to be re-"paired by him who has the mill, and not by the county, becauſe "he erected it for his own benefit." But the court were clear and unanimous, that the Riding was obliged to repair this new bridge. The inhabitants of the county are of common right bound to repair all publick bridges, becauſe they are for the benefit of the county. By *Magna Charta*, none ſhall be diſtrained to *make* bridges, but ſuch as of old time have been accuſtomed. The inhabitants of *Gluſburne* were not bound to *make* or build this new bridge for carts or carriages: Nor are they obliged to *repair* more than they were before bound to repair: And they never * were bound to repair a bridge for horſes, carts, and carriages. What they were bound by preſcription to repair, was only a foot bridge. They have built a quite different bridge, in a different place. The caſe in *Roll's Abr.* about a mill erected for a perſon's own benefit is different. There the private emolument continued to the perſon who erected it: And it was not reaſonable for him to make the county contribute to it, whilſt the private benefit continued to himſelf. But this bridge for horſes, carts, and carriages was for the common publick utility of the county, and therefore is within the rule, that "if a "man builds a bridge, and it becomes uſeful to the county in ge-"neral the county ſhall repair it." The common law therefore attached upon this bridge, and the county ought to repair it. *Burrow* Manſf. 2594. *Black. Rep.* 685.

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4. By the 22 H. 8. c. 5. "Whereas in many places, it cannot "be known and proved, what hundred, town, pariſh, perſon, "or body politick ought to repair bridges broken in the highways; "in every ſuch caſe, the ſaid bridges, if they be without a city or "town corporate, ſhall be made by the inhabitants of the "county; if within a city or town corporate, then by the inha-"bitants of ſuch city or town corporate; if part be in one ſhire, "city, or town corporate, and part in another, or part within the li-"*mits* of a city or town corporate, and part without, the inhabi-"tants of the ſhire, cities, or towns corporate, ſhall repair ſuch "part as lies within their limits." ſ. 3.

Bridges broken in the highways] This extendeth only to common bridges in the king's highways, and not to private bridges to mills, or the like; the remedy in which caſe is not by indictment but by action 2 *Inſt.* 701.

Within a city or town corporate] It hath been queſtioned, whether a borough which hath no bridge within it's own limits, be not liable to contribute to the repairs of a county bridge. 1 *Hawk.* 225.

By the inhabitants] The perſons to be charged by this act are comprehended under the word *inhabitants*; which word, being the largeſt word of the kind, is needful to be explained:

Firſt,

Firſt, altho' a man be dwelling in an houſe, in a foreign county, city, or town corporate; yet if he hath lands in his own poſſeſſion and manurance in the county, city, or town corporate, where the decayed bridge is, he is an inhabitant, both where his perſon dwelleth, and where he hath lands in his own poſſeſſion.

* Secondly, If a man dwelleth in a foreign ſhire, city, or town corporate, and keepeth a houſe and ſervants in another ſhire, city, or town corporate; he is an inhabitant in each ſhire, city, or town corporate within this ſtatute. *278

Thirdly, *Ex vi termini*, every perſon that dwelleth in any ſhire, city, or town corporate, tho' he hath but a perſonal reſidence, yet he is ſaid in law to be an inhabitant, or a dweller there, as ſervants, or the like; but this ſtatute extendeth not to them, but to ſuch houſholders who may be diſtrained for non-payment: And it would be infinite and impoſſible, to tax every inhabitant being no houſholder.

Fourthly, Every corporation and body politic, reſiding in any county, city, or town corporate, or having lands or tenements in any county, city, or town corporate which they keep in their own hands and occupation, are ſaid to be inhabitants there, within the purview of this ſtatute.

Fifthly, An infant, that hath houſe or lands by deſcent or purchaſe, is liable to this public charge; and ſo is the huſband of a feme covert. 2 *Inſt.* 702.

5. A tenant at will of an houſe, which adjoins to a common bridge, is bound to repair the houſe, ſo that the publick be not prejudiced by the want of repair, although he be not bound to repair as to his landlord. L. *Raym.* 856.

6. The freehold of bridges is in him that hath the freehold of the ſoil; but the free paſſage is for all the king's liege people. 2 *Inſt.* 705.

II. Power of the leet to inquire thereof.

Decays of bridges are preſentable in the leet, or torn. 2 *Inſt.* 701.

III. Power of the juſtices in ſeſſions.

"The juſtices, or four of them at the leaſt (1Q.) ſhall have "power to inquire, hear and determine in the general ſeſſions, of "all manner of annoyances of bridges broken in the highways, "to the damage of the king's liege people, and to make ſuch pro"ceſs and pains upon every preſentment againſt ſuch as ought to "be charged to make or amend them, as the king's bench uſually "doth, or as it ſhall ſeem by their diſcretions to be neceſſary and "convenient, for the ſpeedy amendment of ſuch bridges." 22 H. 8. c. 5. ſ. 1.

*279 * *Four of them at the leaſt*] If the bridge be within a franchiſe, which hath not four juſtices, and a ſeſſions of its own, the juſtices of the county ſhall inquire: but if the franchiſe be a county of itſelf, and hath not four juſtices (1 Q.) it is not within this ſtatute, but is left to the remedy which it had at common law. 2 *Inſt.* 702.

And to make proceſs] Where the bridge is in one ſhire, and the perſons or lands which ought to be charged are in another ſhire; or where the bridge is within a city or town corporate, and the perſons or lands that ought to be charged are out of the ſaid city; the juſtices of ſuch ſhire, city, or town corporate, ſhall have power to hear and determine ſuch annoyances, being within the limits of their commiſſion: and if the annoyance be preſented, then to make proceſs into every ſhire of the realm, againſt ſuch as ought to repair the ſame, and to do further in every behalf as they might do, if the perſons or lands chargeable were in the ſame ſhire, city, or town corporate where the annoyance is. 22 H. 8. c. 5. ſ. 5.

As the king's bench uſually doth] The preſentment at common law, might be before the king's bench, or at the aſſizes. 2 *Inſt.* 701.

IV. Concerning the 300 foot at the ends of bridges.

Such part and portion of the highways, as well within franchiſes as without, as lie next adjoining to any ends of any bridges, diſtant from any of the ſaid ends by the ſpace of 300 foot, ſhall be made, repaired, and amended as often as need ſhall require; and the juſtices, or four of them (1 Q.) ſhall have power to inquire, hear and determine, in the general ſeſſions, all manner of annoyances of and in ſuch highways, ſo being and lying next adjoining to any ends of bridges, diſtant from any one of the ends of ſuch bridges 300 foot, and to do in every thing concerning the making, repairing and amending of ſuch highways, in as ample manner as they may do for the making, repairing, and amending of bridges. 22 H. 8. c. 5. ſ. 9.

V. Indictment of bridges.

1. "No money ſhall be applied to the repair of bridges, until "preſentment be made by the grand jury at the aſſizes or ſeſſions, "of their inſufficiency, inconveniency, or want of reparation." 12 G. 2. c. 29. ſ. 13.

*280 * 2. An indictment for not repairing a bridge, ought to ſhew what ſort of a bridge it is, whether for carts and carriages, or for horſes, or for footmen only. L. *Raym.* 1175.

3. If a man be indicted for that by reaſon of the tenure of certain lands he is bound to repair a bridge, it muſt be alledged where thoſe lands lie. 2 *H. H.* 181.

4. Any

4. Any particular inhabitant of a county, or tenant of land charged to the repairs of a bridge, may be made defendant to an indictment for not repairing it, and be liable to pay the whole fine aſſeſſed by the court, for the default of repairs, and ſhall be put to his remedy at law for a contribution from thoſe, who are bound to bear a proportionable ſhare in the charge; for the neceſſity of the caſe requires the greateſt expedition in caſes of this nature: for bridges being of abſolute neceſſity, are not to lie unrepaired till ſuits are determined. 1 *Haw.* 221.

5. If a manor be held by the ſervice or tenure of repairing a common bridge or highway, and that manor afterwards comes to be divided into ſeveral hands; every one of theſe alienees being tenants of any parcel, either of the demeſnes or ſervices, ſhall be liable to the whole charge, and are contributory among themſelves. And tho' the lord of the manor might, upon the ſeveral alienations, agree to diſcharge thoſe that purchaſed of him, of ſuch repairs; yet that ſhall not alter the remedy for the publick, but only bind the lord and thoſe that claim under him. As the whole manor, and every part of it, in the poſſeſſion of one tenant, was once chargeable with the reparation; ſo it ſhall remain, notwithſtanding any act of the proprietor: It ſhall not be in his power to apportion the charge whereby the remedy for publick benefit ſhould be made more difficult, or by alienations to perſons unable to render it, in reſpect of the parts which ſhould come into ſuch hands, quite fruſtrate. 1 *Salk.* 358.

6. It hath been reſolved, that it is not ſufficient for the defendants to an indictment for not repairing a bridge, to excuſe themſelves, by ſhewing either that they are not bound to repair the whole, or any part of the bridge, without ſhewing what other perſon is bound to repair the ſame; and it is ſaid, that in ſuch caſe the whole charge ſhall be laid upon ſuch defendants, by reaſon of their ill plea. 1 *Haw.* 221.

7. It ſeemeth, that no inhabitant of a county ought to be a *juror* for the trial of an iſſue, whether the county be bound to ſuch repairs or not; and therefore the jury muſt come from ſome adjacent county. 1 *Haw.* 222.

* And it ſeemeth that the ſame objection may lie as to the *juſtices*, where they are (as it may probably happen) all intereſted. In which caſe it ſeemeth that the trial ſhall be in the next county. For where an impartial trial cannot be had in the proper county, it ſhall be tried as near to the ſame as may be. As in the caſe of the king and the inhabitants of the county of the city of *Norwich*, concerning a county bridge, the trial was in *Suffolk*. Burrow *Manſfield* 859, 860. *281

But by a ſpecial ſtatute, an inhabitant of the county, in ſuch caſe, may be a *witneſs*. 1 Ann. ſt. 1. c. 18.

8. "No fine, iſſue, penalty, or forfeiture, upon any preſentment, or indictment for not repairing bridges, or the highways "at the ends of bridges, ſhall be returned into the exchequer, but

" ſhall be paid to the treaſurer, to be applied towards the ſaid re-
" pairs, and not otherwiſe." 1 Ann. ſt. 1. c. 18. ſ. 4.

9. " And no preſentment or indictment for not repairing
" bridges, or highways at the ends of bridges, ſhall be removed
" by *certiorari* out of the county into another court." 1 Ann. ſt. 1. c. 18. ſ. 5.

But a *certiorari* lies to remove an order made by the juſtices, concerning the repair of a bridge, purſuant to a private act of parliament; and the juſtices ought to return the private act upon which their order is founded. *Dalt.* 504.

E. 4 G. 2. *K.* and the inhabitants of *Handſworth.* Upon motion to quaſh a *certiorari* to remove an indictment againſt the defendants at ſeſſions, for not repairing a bridge; it was inſiſted, that by the 1 Ann. c. 18. the *certiorari* is taken away. To which it was anſwered, and reſolved by the court, that this act extendeth only to bridges where the county is charged to repair; and that where a private perſon or pariſh is charged, and the right will come in queſtion, the act of the 5 & 6 W. c. 11. hath allowed the granting a *certiorari.* And therefore they refuſed to quaſh. *Str.* 900.

VI. Charges of repairing.

By the 12 G. 2. c. 29. The charges of repairing and amending bridges, and highways at the ends of bridges, ſhall be paid out of the general county rate. ſ. 1.

VII. Surveyors of the work.

The four juſtices in ſeſſions as aforeſaid may appoint two ſurveyors, with ſalaries, to ſee the bridges amended. 22 H. 8. c. 5. ſ. 4.

*282 * And this buſineſs of ſurveying the bridges, for the more convenience, is uſually annexed by the juſtices to the office of the high conſtables; for which they have by this clauſe power to allow them ſalaries.

VIII. Manner of repairing.

1. It ſeemeth to be clear, that thoſe who are bound to repair bridges, muſt make them of ſuch height and ſtrength, as ſhall be anſwerable to the courſe of the water, whether it continue in the old channel, or make a new one. 1 *Haw.* 221.

2. And perſons are not treſpaſſers, for entring on any adjoining lands for repairing bridges, or laying thereon the requiſite materials. 1 *Haw.* 221.

IX. Purchaſing

IX. *Purchaſing lands adjoining.*

The juſtices at their ſeſſions may purchaſe any parcel of land, adjoining or near to any county bridge, for the more commodious enlarging, or convenient rebuilding the ſame, not exceeding one acre, to be paid for by the treaſurer out of the county rates, by order under the hands and ſeals of the ſaid juſtices in their ſaid ſeſſions; which lands ſo purchaſed, ſhall be conveyed to ſuch perſon or perſons as the juſtices in the ſaid ſeſſions ſhall appoint, in truſt, for enlarging or rebuilding the ſaid bridges. 14 G. 2. c. 33.

X. *Contracting for a term of years.*

By the 12 G. 2. c. 29. ſ. 14. When any publick bridges, ramparts, banks, or cops, are to be repaired at the expence of the county, the juſtices at their general or quarter ſeſſions, after preſentment made by the grand jury of their want of reparation, may contract with any perſon for rebuilding, repairing, and amending the ſame, for any term not exceeding ſeven years, at a certain annual ſum.

In order to which they ſhall give publick notice of their intention of contracting with any perſon, for rebuilding, repairing, and amending the ſame.

And ſuch contracts ſhall be made at the moſt reaſonable price which ſhall be propoſed by the contractors; who ſhall give ſufficient ſecurity for the due performance thereof, to the clerk of the peace.

* And all contracts when agreed to, and all orders relating thereto, * 283
ſhall be entered in a book to be kept by the clerk of the peace for that purpoſe; who ſhall keep the ſame amongſt the records of the county, to be inſpected by any of the juſtices at all ſeaſonable times, and by any perſon employed by any pariſh or place, contributing to the ſame without fee.

Indictment for a bridge out of repair.

Weſtmorland. { *BY the oaths of* ——— *good and lawful men of the county aforeſaid, then and there ſworn and charged to inquire for our ſaid lord the king, and the body of the county aforeſaid, it is preſented, that a certain common bridge, over the river* ——— *commonly called* ——— *bridge, lying and being in the pariſh of* ——— *in the county aforeſaid, in the king's common highway there, leading from the market town of* ——— *to the market town of* ——— *in the ſaid county, altogether and*

from the time whereof the memory of man is not to the contrary, being a common king's highway for all the lieges and subjects of our said lord the king and of his ancestors, with their horses, carts, and carriages to go, pass, ride, and travel at their pleasure, on the ——— day of ——— in the ——— year of the reign of ——— was, and yet is in great decay, broken, and ruinous; so that the lieges and subjects of our said lord the king, upon and over the said bridge with their horses, carts, and carriages could not and cannot go, pass, ride, and travel, without great danger, to the grievous damage and nusance of all the lieges and subjects of our said lord the king, upon and over the same bridge going, passing, riding, and travelling, and against the peace of our said lord the king, his crown and dignity.

And that the inhabitants of the county aforesaid, the common bridge aforesaid (so as aforesaid being in decay) ought to repair and amend, when, and so often as it shall be necessary.

[Or, *And that A. O. late of ——— in the said county, gentleman, by reason of his tenure of certain lands lying in the parish of ——— aforesaid, and elsewhere in the said county, ought to make, repair, and amend the said common bridge, as often as and when it shall be necessary.*]

What it is. 1. BUGGERY (from the *Italian bugarone*, a buggerer, this vice being said to have been brought into *England* out of *Italy* by the *Lombards*) is a detestable and abominable sin, amongst christians not to be named, committed by carnal knowledge, against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast. 3 *Inst.* 58.

The punishment. 2. And by the statute 25 H. 8. c. 6. Buggery committed with mankind or beast is made felony without benefit of clergy. And the justices of the peace may hear and determine the same, as in cases of other felonies.

Principal and accessary. 3. Which said statute making it felony generally, there may be accessaries both before and after. But those that are present, aiding and abetting, are all principals. And altho' none of the principals are admitted to their clergy, yet accessaries before and after are not excluded from clergy. 1 *H. H.* 670.

Infants. 4. If the party buggered be within the age of discretion (which is generally reckoned the age of 14) it is no felony in him, but in the agent only.

But

But if buggery be committed upon a man of the age of diſcretion, it is felony in them both. 3 *Inſt.* 59. 1 *H. H.* 670.

5. By the articles of the navy (22 G. 2. c. 33.) if any perſon in the fleet ſhall commit the unnatural and deteſtable ſin of buggery or ſodomy, with man or beaſt; he ſhall be puniſhed with death by the ſentence of a court martial. *Navy.*

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* BURGLARY.

Offences againſt the houſe of another, which fall ſhort of burglary, belong to title *Larceny*, under the head *Larceny from the houſe*.

I. What is burglary.
II. Puniſhment thereof.
III. Reward for convicting a burglar.

I. What is burglary.

1. THE word *burglar* ſeemeth to have been brought unto us out of *Germany* by the *Saxons*, and to be derived of the German *burg*, a houſe, and *larron*, a thief, probably from the Latin, *latro*, *latronis*. *Derivation of burglary.*

2. Burglary "is a felony at common law, in "breaking and entring the manſion houſe of "another, in the night, with intent to commit "ſome felony within the ſame, whether the felonious intent be "executed or not." Hale's Pl. 79. *Definition of burglary.*

—*Breaking*] Every entrance into the houſe by a treſpaſſer, is not a breaking in this caſe; but there muſt be an actual breaking. As if the door of a manſion houſe ſtand open, and the thief enter, this is not breaking. So it is if the window of the houſe be open, and a thief with a hook or other engine draweth out ſome of the goods of the owner, this is no burglary, becauſe there is no actual breaking of the houſe. But if the thief breaketh the glaſs of the window, and with a hook or other engine draweth out ſome of the goods

goods of the owner, this is burglary, for there was an actual breaking of the houſe. 3 *Inſt.* 64.

And Lord *Hale* ſays, theſe acts amount to an actual breaking; opening the caſement or breaking the glaſs window, picking open the lock of a door, or putting back the lock, or the leaf of a window, or unlatching the door that is only latched. 1 *H. H.* 552.

At a meeting of the judges upon a ſpecial verdict, in *January* 1690, they were divided upon the queſtion, whether breaking open the door of a *cupboard* let into the wall of the houſe was burglary or no. Concerning which, Sir *Michael Foſter* ſays, with regard to cupboards, preſſes, lockers, and other fixtures of the like kind; it ſeemeth, that, in favour of life, a diſtinction ought to be made
*286 between caſes relating to mere property, and ſuch wherein * life is concerned. In queſtions between the heir or deviſee and the executor, whoſe fixtures may with propriety enough be conſidered as annexed to, and parts of the freehold, the law will preſume, that it was the intention of the owner, under whoſe bounty the executor claimeth, that they ſhould be ſo conſidered; to the end that the houſe might remain to thoſe, who by operation of law, or by his bequeſt, ſhould become intitled to it, in the ſame plight he put it or ſhould leave it, intire and undefaced. But in capital caſes, it ſeemeth, that ſuch fixtures, which merely ſupply the place of cheſts and other ordinary utenſils of houſhold, ſhould be conſidered in no other light than as mere moveables, partaking of the nature of thoſe utenſils, and adapted to the ſame uſe. *Foſt.* 108, 9.

M. 8 G. *K.* and *Gray.* One of the *ſervants* in the houſe, opened his lady's chamber door, (which was faſtened with a braſs bolt) with a deſign to commit a rape; and it was ruled to be burglary, and the defendant was convicted and tranſported. *Str.* 481.

By the ſtatute of the 12 An. c. 7. If any perſon ſhall enter into the manſion houſe of another, by day or night, without breaking the ſame, with an intent to commit felony, or being in ſuch houſe ſhall commit any felony, and ſhall in the night time break the ſaid houſe to get out, he ſhall be guilty of burglary, and ouſted of the benefit of clergy, in the ſame manner as if he had broken and entred the houſe in the night time, with intent to commit felony.

M. 4 G. 2. *Joſhua Cornwall's* caſe. He was indicted with another perſon for burglary. And upon the evidence it appeared, that he was a ſervant in the houſe, where the robbery was committed, and in the night time opened the ſtreet door, and let in the other priſoner, and ſhewed him the ſide-board, from whence the other priſoner took the plate: then the defendant opened the door and let him out; but the defendant did not go out with him, but went to bed. Upon the trial it was doubted, whether this was burglary in the ſervant, he not *going out* with the other. But afterwards at a meeting of all the judges at *Serjeant's Inn*, they were all of opinion that it was burglary in both, and not to be diſtinguiſhed from the caſe where one watches at the ſtreet end, whilſt another goes in

and

and commits the burglary, which hath often been ruled to be burglary in both: and upon report of this opinion the defendant was executed. *Str.* 881.

* *And entring*] It is deemed an entry, when the thief breaketh the house, and his body, or any part thereof, as his foot, or his arm, is within any part of the house; or when he putteth a gun into a window which he hath broken, or into a hole of the house which he hath made of intent to murder or kill; this is an entry and breaking of the house: but if he doth barely break the house, without any such entry at all, this is no burglary. 3 *Inst.* 64. *287

In the case of *George Gibbons*, at the *Old Bailey* in *June* 1752; *Gibbons* was indicted for burglary in the dwelling house of *John Allen*. It appeared in evidence, that the prisoner in the night time cut a hole in the window shutters of the prosecutor's shop, which was part of his dwelling house; and putting his hand thro' the hole, took out watches and other things, which hung in the shop within his reach: but no entry was proved, otherwise than by putting his hand thro' the hole. This was held to be burglary, and the prisoner was convicted. *Fost.* 107, 8.

If divers come in the night to do a burglary, and one of them break and enter, the rest of them standing to watch, at a distance, this is burglary in all. 3 *Inst.* 64.

The mansion house] This includes also churches, and the walls and gates of a walled town. 1 *Haw.* 103.

Mr. *Hawkins* says, all out-buildings, as barns, stables, dairy houses, adjoining to a house, are looked upon as part thereof; and consequently burglary may be committed in them: but if they be removed at any distance from the house, it seems that it hath not been usual of late to proceed against offences therein as burglaries. 1 *Haw.* 104.

And lord *Hale* says more explicitly, the mansion house doth not only include the dwelling house, but also the outhouses that are parcel thereof, as barn, stable, cow-house, dairy-house, if they are parcel of the messuage, tho' they are not under the same roof, or joining contiguous to it; and so, he says it was agreed by all the judges: but if they be no parcel of the messuage, as if a man take a lease of a dwelling house from one, and of a barn from another; or if it be far remote from the dwelling-house, and not so near to it as to be reasonably esteemed parcel thereof, as if it stand a bow-shot off from the house, and not within or near the curtilage of the chief house, then the breaking is not burglary, for it is not a mansion house, nor any part thereof. 1 *H. H.* 558, 9.

To break and enter a *shop*, not parcel of the mansion house, in which the shopkeeper never lodges, but only * works or trades there in the day time, is not burglary, but only larceny; but if he, or his servant usually, or often lodge in the shop at night, it is then a mansion house, in which burglary may be committed. 1 *H. H.* 557, 8. *288

It is not neceſſary to make it burglary, that any perſon be actually in the houſe, at the very time of the offence committed. 1 *How.* 103.

At *Newgate* ſeſſions, in *January* 1750, *John Nutbrown*, and *Miles Rutbrown* were indicted for burglary in the dwelling houſe of one Mr. *Fakney* at *Hackney*, and ſtealing divers goods. It appeared by Mr. *Fakney*'s evidence, that he held this houſe for a term of years not yet expired, and made uſe of it as a country houſe in the ſummer, his chief reſidence being in *London*: That about the latter end of the laſt ſummer, he removed with his whole family to his houſe in the city, and brought away a conſiderable part of his goods: That in *November* laſt, his houſe was broke open, and in part rifled; upon which he removed the remainder of his houſhold furniture, except a clock, and a few old bedſteads, and ſome lumber of very little value; leaving no bed, or kitchen furniture, or any thing elſe for the accommodation of a family. Mr. *Fakney*, being aſked, whether at the time he ſo diſfurniſhed his houſe, he had any intention of returning to reſide there, declared that he had not come to any ſettled reſolution whether to return or not; but was rather inclined totally to quit the houſe, and to let it for the remainder of his term. The fact the priſoners were charged with was ſufficiently proved; and was committed about midnight the firſt of *January* laſt. The court was of opinion, that the proſecutor having left his houſe, and diſfurniſhed it in the manner before mentioned, without any ſettled reſolution of returning, but rather inclining to the contrary, it could not, under theſe circumſtances, be deemed his dwelling houſe, at the time the fact was committed; and accordingly directed the jury to acquit the priſoners of the burglary, which they did, but found them guilty of felony in ſtealing the clock and ſome other ſmall matters. And they were ordered for tranſportation.—And the diſtinction is this: Where the owner quitteth the houſe, *animo revertendi*, it may ſtill be conſidered as his manſion houſe, tho' no perſon be left in it; many citizens, and ſome lawyers, do ſo from a principle of good huſbandry, in the ſummer, or for a long vacation. But there muſt be an intention of returning, otherwiſe it will be no burglary. *Foſt.* 76, 77.

In the night] Lord *Coke* ſays, as long as the day continues,
*289 whereby a man's countenance may be diſcerned, it * is called day; and when darkneſs comes, and day light is paſt, ſo as by the light of day you cannot diſcern the countenance of a man, then it is called night. And this doth aggravate the offence; ſince the night is the time wherein man is at reſt, and wherein beaſts run about ſeeking their prey. Hence in ancient records, the twylight was ſignified, when it was ſaid, *inter canem & lupum*, (between the dog and the wolf;) for when the night begins, the dog ſleeps, and the wolf ſeeketh his prey. 3 *Inſt.* 63.

At the *Lancaſter* Lent aſſizes 1771; *K.* and *Waddington.* There was an indictment for burglary, alledging the fact to be committed in the night, but not expreſſing about what hour it was done. Mr. juſtice *Gould* held the indictment inſufficient as for a burglary, and directed the priſoner to be found guilty of a ſimple felony only. He ſaid, that according to the old doctrine, a burglary might be committed at any time between ſun ſetting and ſun riſing; but that the rule now eſtabliſhed is, that it cannot be committed during the *crepuſculum*; that therefore it is neceſſary to ſpecify the *hour*, in order that the fact may appear upon the face of the indictment to be done between the twylight of the evening and that of the morning.

Accordingly, Sir *William Blackſtone* ſays, the better opinion ſeems to be, that if there be daylight enough, begun or left, to diſcern a man's face withal, it is no burglary. But this doth not extend to moonlight; for then many midnight burglaries would go unpuniſhed: and beſides, the malignity of the offence doth not ſo properly ariſe from its being done in the dark, as at the dead of night; when all the creation, except beaſts of prey, are at reſt; when ſleep has diſarmed the owner, and rendered his caſtle as it were defenceleſs. 4 *Black.* 224.

With intent to commit felony] There can be no burglary, but where the indictment both expreſsly alledges, and the verdict alſo finds, an intention to commit ſome felony; for if it appear, that the offender meant only to commit a treſpaſs, as to beat the party, or the like, he is not guilty of burglary. 1 *Haw.* 105.

However it ſeems the much better opinion, that an intention to commit a rape or other ſuch crime, which is made felony by ſtatute, and was a treſpaſs only at common law, will make a man guilty of burglary, as much as if ſuch offence was a felony at common law; becauſe wherever a ſtatute makes any offence felony, it incidentally gives it all the properties of a felony at common law. 1 *Haw.* 105.

* *Whether the felonious intent be executed or not*] Thus they are bur- *290
glars, who break any houſe, or church in the night, although they take nothing away. And herein this offence differs from robbery, which requires that ſomething be taken, tho' it is not material of what value.

Where a man commits burglary and at the ſame time ſteals goods out of the houſe, it is alſo larceny; and if he be acquitted of the burglary, he may notwithſtanding be indicted of the larceny; for they are ſeveral offences, tho' committed at the ſame time. And burglary may be, where there is no larceny; and larceny may be, where there is no burglary. 2 *H. H.* 246.

II. Puniſhment thereof.

By the 18 El. c. 7. and 3 W. c. 9. Benefit of clergy is taken away in caſes of burglary, both from the principal, and the acceſſary before; but in all caſes of burglary, acceſſaries after muſt have their clergy. 2 *H. H.* 364. 1 *Haw.* 357, 358.

But by the 10 G. 3. c. 48. Every perſon who ſhall buy or receive any ſtolen jewel or jewels, or any ſtolen gold or ſilver plate, watch or watches, knowing the ſame to have been ſtolen, ſhall in all caſes where ſuch jewel or jewels, or gold or ſilver plate ſhall have been feloniouſly ſtolen, accompanied with a burglary actually committed in ſtealing the ſame, be triable as well before conviction of the principal felon whether he be in or out of cuſtody, as after his conviction; and if ſuch perſon ſo buying or receiving ſhall be convicted thereof, he ſhall be guilty of felony, and tranſported for 14 years.

III. Reward for convicting a burglar.

Indemnity for killing him.

1. It may be obſerved in the firſt place, that it is provided by the 24 H. 8. c. 36. That there ſhall be no forfeiture of lands or goods, for killing any perſon that attempts to commit burglary.

But beſides this indulgence to a perſon killing ſuch an offender in defence of his houſe, there are ſpecial advantages and rewards for apprehending and convicting him in due courſe of law; which are as follows:

Charges of convicting him to be reimburſed.

2. By the 25 G. 2. c. 36. The charges of proſecuting and convicting a burglar, ſhall be paid by the treaſurer of the county where the burglary was committed, on producing to him the order of the court for that purpoſe, * which the clerk of aſſize, or of the peace, ſhall make out, for the fee of 1s. ſ. 11.

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And alſo the charges of poor witneſſes appearing on their recognizance, by the 27 G. 2. c. 3. on paying 6d for the order: except in *Middleſex*, where the ſaid charges ſhall be paid by the overſeers of the poor where the perſon was apprehended.

And by the 18 G. 3. c. 19. The court, before whom any perſon hath been tried and convicted, or tried and *acquitted*, in caſe it ſhall appear to the ſaid court that there was a reaſonable ground of proſecution, and that the proſecutor had *bona fide* proſecuted, may order

der the treaſurer to pay to ſuch proſecutor ſuch ſum as they ſhall think reaſonable, not exceeding the expences he was *bona fide* put unto, making alſo, if he ſhall appear to be in poor circumſtances, a reaſonable allowance for his trouble and loſs of time.—And the juſtices in ſeſſions may lay down or alter from time to time ſuch rules and regulations, as to ſuch coſts or charges thereafter to be allowed to any perſon, as to them ſhall ſeem juſt: which rules and regulations, having received the approbation and ſignature of one or more of the judges of aſſize, ſhall be binding, and not otherwiſe, on all perſons whatſoever. ſ. 7, 9.

Exceptions from pariſh offices for taking and convicting him.

3. Every perſon who ſhall apprehend any one guilty of burglary and proſecute him to conviction, ſhall have a certificate without fee, under the hand of the judge, certifying ſuch conviction, and within what pariſh or place the burglary was committed, and alſo that ſuch burglar was diſcovered and taken, or diſcovered or taken, by the perſon ſo diſcovering or apprehending; and if any diſpute ariſe between ſeveral perſons ſo diſcovering or apprehending, the judge ſhall appoint the certificate into ſo many ſhares to be divided among the perſons concerned, as to him ſhall ſeem juſt and reaſonable:

And if any perſon ſhall happen to be ſlain by ſuch burglar, in endeavouring to apprehend him, the executors or adminiſtrators of ſuch perſon ſlain ſhall have the like certificate:

Which certificate ſhall be inrolled by the clerk of the peace of the county in which it ſhall be granted; for which he ſhall have 1s and no more:

And the ſaid certificate ſhall be once aſſigned over; and the original proprietor, or the aſſignee of the ſame, ſhall by virtue thereof be diſcharged from all manner of pariſh and ward offices, within the pariſh and ward where the felony was committed. 10 & 11 W. c. 23.

* In the caſe of the *King* and *Derbyſhire*, *T.* 1 G. 3. The de- *292
fendant *John Derbyſhire* was indicted at the ſeſſions for refuſing to take upon him the office of *conſtable* for the manor of *Birmingham*. The indictment being removed by certiorari, the cauſe was tried at *Warwick* aſſizes, and the jury found ſpecially, that the defendant was a fit perſon in all reſpects to be nominated and elected to the office, unleſs diſcharged or exempt therefrom by reaſon of a certificate he had under this act. It appeared that the uſage at *Birmingham* had been, annually at the court leet there, for the jury to elect two conſtables for the manor of *Birmingham* generally, and one conſtable for the hamlet of *Deritend* (a diſtinct vill within the ſaid manor) particularly: that the manor of *Birmingham* extends into and comprehends the whole town and pariſh of *Birmingham*, and alſo the ſaid hamlet of *Deritend*: that the conſtables ſo elected for the ſaid manor of *Birmingham* generally, have juriſdiction and authority, as conſtables, not only throughout the ſaid town and pariſh of *Birmingham*, but alſo within and throughout the ſaid ham-

let of *Deritend*: that the conſtable of *Deritend* is elected out of the inhabitants of *Deritend* only; and the conſtable ſo elected for *Deritend* particularly, and the ſaid conſtables ſo elected for the ſaid manor of *Birmingham*, have ſeverally equal and concurrent juriſdiction within the ſaid hamlet of *Deritend*. The queſtion reſerved for the opinion of the court was, whether the ſaid *John Derbyſhire*, notwithſtanding the certificate, is liable to ſerve the ſaid office. Againſt him, it was urged, that the diſcharge by the act is, from all pariſh and ward offices, within the pariſh or ward wherein the felony was committed. But the limits of this man's office extend beyond the pariſh of *Birmingham*; therefore this is not a pariſh office. And there is no ſuch diviſion in this place as a ward; thereford no ward office. But a conſtable is not a pariſh officer at all. It was a common law office, before pariſhes exiſted; and is as ancient as towns or leets: and a pariſh is not a common law diviſion, but an eccleſiaſtical one. On the other hand, it was anſwered, that he is at leaſt a pariſh officer (whatever more he may be); becauſe his office extends throughout the whole pariſh of *Birmingham*. And he is an inhabitant of the pariſh of *Birmingham*. Therefore, though he be alſo conſtable of the manor, which includes the pariſh; yet he is certainly a pariſh officer, notwithſtanding that greater extent of his juriſdiction or power. By the court: The only queſtion is, whether the conſtable of the manor of *Birmingham* *293 is a pariſh officer of the pariſh of *Birmingham*. * This term *pariſh officer* doth not include every office exerciſed in the pariſh: if it did, it might even take in the office of high ſheriff of the county. A pariſh officer is relative to the pariſh, and confined to the pariſh only. A conſtable of a *pariſh*, may be called a pariſh officer; but this man hath a much larger juriſdiction than the pariſh only; for he hath the juriſdiction over the whole manor, which extends much beyond the pariſh; and the pariſh is only a part of that diſtrict, over which it is to be exerciſed. And the act doth not intend the certificate to be a diſcharge from an office, whereof the functions are to be exerciſed out of the limits of the pariſh. This man cannot be eſteemed a pariſh officer, either from the origin of his office, or from the nature, or from the exerciſe of it. *Burrow* Mansfield. 1182.

40*l for taking and convicting.*

4. And moreover as a further reward, every perſon who ſhall apprehend any perſon guilty of burglary, and proſecute him to conviction, ſhall have a certificate under the hand of the judge, without fee, to be made out and delivered before the end of the aſſizes, certifying the conviction, and in what pariſh the burglary was committed, and alſo that the burglar was taken by the perſon claiming the reward; and if any diſpute ſhall happen to ariſe between the perſons claiming, the judge ſhall by the ſaid certificate appoint the ſame to be paid amongſt the parties claiming the ſame, in ſuch ſhare and proportion as to him ſhall ſeem juſt and reaſonable;

And

And on tender of such certificate to the sheriff, and demand made, he shall pay to the person so intitled, the sum of 40l, without fee or deduction, within one month after such tender and demand, on pain of forfeiting double, with treble costs. 5 Ann. c. 31. 6 G. c. 23. s. 10.

40l to the executor of a person killed.

5. And if any watchman, or any other person, be killed, in endeavouring to apprehend any such burglar, his executors or administrators, shall have a certificate delivered under the hand and seal of the judge, or of the two next justices of the peace, of such person being so killed; which certificate they shall, on sufficient proof before them made, give without fee, whereupon, such executor or administrator shall be intitled to receive the like sum of 40l. in like manner. 5 Ann. c. 31. s. 2.

40l and a pardon, for convicting two accomplices.

6. And moreover, if any person, being out of prison, shall commit any burglary, and afterwards discover two or more the like offenders, so as two or more be convicted; he shall have the like reward and allowance of 40l, and also all other advantages which are given to persons * who shall apprehend and convict any the like offenders; and shall also have the king's pardon for all burglaries, robberies, and felonies (except murder and treason) by him committed before such discovery made; which pardon shall be likewise a good bar to an appeal. 5 Ann. c. 31. s. 4. * 294

Sheriff how to be repaid.

7. And the sheriff on producing the certificates, and receipts for the said rewards, may deduct the same on his accounts; and if he have not money in his hands, he shall be repaid out of the treasury, on certificate from the clerk of the pipe. 5 Ann. c. 31. s. 3.

Or instead of charging the same in his accounts, he may immediately apply to the commissioners of the treasury, who shall forthwith repay the same without fee. 3 G. c. 15. s. 4.

Warrant to apprehend a burglar.

Westmorland. { To the constable of ——

FORASMUCH as A. I. *of* —— *in the county of* —— *yeoman, hath this day made information and complaint upon oath, before me,* J. P. *esquire, one of his majesty's justices of the peace for the said county, that yesterday in the night the dwelling house of him the said* A. I. *at* —— *aforesaid in the county aforesaid, was feloniously and burglariously broken open, and one silver tankard of the value of* 5l. *of the goods and chattels of him the said* A. I. *feloniously and burglariously stolen, taken and carried away from thence; and that he hath just cause to suspect, and doth suspect, that* A. O. *late of* —— *in the county of* —— *labourer, the said felony and burglary did commit: These are therefore in his said majesty's name to command you, that*

that immediately upon ſight hereof you do apprehend the ſaid A. O. *and bring him before me to anſwer the premiſſes, and to be further dealt withal according to law. Herein fail you not. Given under my hand and ſeal the* ——— *day of* ——— *in the year* ———.

Indictment for proper burglary.

Weſtmorland. THE *jurors for our lord the king upon their oath preſent, That* A. O. *of* ——— *in the county of* ——— *labourer, on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— *at the hour of one in the night of the ſame day, with force and arms, at* ——— *in the county of* ——— *the dwelling houſe of* A. I.
* 295 * *feloniouſly and burglariouſly did break and enter, with intent him the ſaid* A. I. *of his goods in the ſame dwelling houſe then being, feloniouſly and burglariouſly to ſpoil and rob, and the ſame goods feloniouſly and burglariouſly to ſteal, take, and carry away; againſt the peace of our ſaid lord the king, his crown and dignity.*

Indictment for burglary and larceny.

Weſtmorland. THE *jurors for the lord the king upon their oath preſent, That* A. O. *late of* ——— *in the county of* ——— *labourer, on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— *betwixt the hours of ten and eleven in the night of the ſame day, with force and arms, at* ——— *in the county of* ——— *the dwelling houſe of* A. I. *feloniouſly and burglariouſly did break and enter, and one ſilver tankard of the value of* 5l, *of the goods and chattels of him the ſaid* A. I. *in the ſaid dwelling houſe then and there feloniouſly and burglariouſly did ſteal, take, and carry away; againſt the peace of our ſaid lord the king, his crown and dignity.*

Burials. See *Regiſter.*

BURNING.

Houſe burning at the common law.

1. MALICIOUSLY *and voluntarily burning the houſe of another, by night or by day, is felony at the common law.* 1 *Haw.* 105.

Maliciouſly

Maliciouſly and voluntarily] For if it be done by miſchance or negligence, it is no felony. 3 *Inſt.* 67.

Yet if a man maliciouſly intending only to burn one perſon's houſe, happens thereby to burn the houſe of another, it is certain that he may be indicted as having maliciouſly burned the houſe of that other; for where a felonious deſign againſt one man miſſeth its aim, and takes effect upon another, it ſhall have the like conſtruction as it it had been levied againſt him who ſuffers by it. 1 *Haw.* 106.

Burning] Neither a bare intention to burn a houſe, nor even an actual attempt to do it by putting fire to a part of a houſe, will amount to a felony, if no part of it be burned: but if any part of the houſe be burnt, the offender is guilty of felony, notwithſtanding the fire afterwards be put out, or go out of itſelf. 1 *Haw.* 106.

* *The houſe*] Not only a manſion-houſe, and the principal parts thereof, but alſo any other houſe, and the out-buildings, as barns and ſtables adjoining thereto; and alſo barns full of corn, whether they be adjoining to any houſe or not, are ſo far ſecured by law, that the malicious burning of them is felony at common law. 1 *Haw.* 105. *296

Of another] Mr. *Hawkins* ſays, a perſon ſeiſed in fee, or but poſſeſſed for years, of a houſe ſtanding by itſelf at a diſtance from all others, cannot commit felony in burning the ſame: Alſo, that it ſeems the much ſtronger opinion, that a man ſo ſeiſed or poſſeſſed of a houſe in a town, who burns his own with an intent to burn his neighbour's, but in the event burns his own only, is not guilty of felony; but however it is certainly an offence highly puniſhable, in regard of the malice thereof, and the great danger to the publick which attends it; and the offender may be ſeverely fined, and impriſoned during the king's pleaſure, and ſet on a pillory, and bound to his good behaviour. 1 *Haw.* 106.

And ſo it was in *Holmes*'s caſe, *M.* 10 Cha. *Holmes* was indicted at *Newgate* ſeſſions, and convicted, for that he, being poſſeſſed of a houſe in *London* for ſix years, remainder to another for three years, reverſion to the corporation of *Haberdaſhers* in fee, did burn the ſaid houſe. And the indictment being removed into the king's bench by certiorari, it was held by three juſtices, againſt the opinion of *Croke* juſtice, that it was not felony to burn a houſe whereof he was in poſſeſſion by virtue of a leaſe for years. For they ſaid the burning of a houſe is not felony, unleſs it be the houſe of *another*. Wherefore he was diſcharged of the felony. But becauſe it was an exorbitant offence, they ordered, that he ſhould be fined 500l to the king, and impriſoned during the king's pleaſure; and ſhould ſtand upon the pillory, with a paper on his head ſignifying the offence at *Weſtminſter* and at *Cheapſide*, upon the market day, and in the place where he committed the offence; and ſhould be bound to his good behaviour during life. *Cro. Car.* 376.

In

In the caſe of *Elizabeth Harris*, at *Ayleſbury*, Lent aſſizes, 1753, before Mr. Juſtice *Deniſon*; *Elizabeth Harris*, a girl of 14 years of age, and of ſufficient underſtanding for her years, was indicted for maliciouſly ſetting fire to, and burning a dwelling houſe in the poſſeſſion of *Edward Stokes*: and *Ann* the wife of *William Courſe*, *297 was indicted as an acceſſary to the felony before the fact. * The priſoner *Elizabeth Harris* was the daughter of the priſoner *Anne* by a former huſband, *John Harris*. It appeared in evidence at the trial, that *John Harris* died ſeiſed of the equity of redemption of this houſe and of another adjoining to it, ſubject to a mortgage term for 20l. And that the equity deſcended to his eldeſt ſon, a child left with other children under the care of their mother the priſoner *Anne*; who was intitled to dower out of theſe houſes, but no dower was ever aſſigned: That *Anne* having the care of her ſon and his eſtate, let theſe houſes to *Edward Stokes* at the rent of 5l a year, and received the rent for ſome time; but having a large family of children, ſhe was obliged to aſk relief of the pariſh where ſhe lived: That ſhe was denied ſuch relief, on account of theſe houſes; the pariſhioners inſiſting, that the overſeers of the poor ſhould be let into the receipt of the rent before ſhe ſhould be intitled to any parochial relief: That thereupon ſhe frequently declared, ſhe would ſet the houſing on fire, if the pariſh did not relieve her; that ſhe had young children, whom the pariſh could not puniſh, tho' they might puniſh her; and ſhe would order the leaſt child ſhe had who could carry a coal of fire, to burn the houſing down: And many other declarations of the like kind ſhe made, which diſcovered an obſtinate reſolution in her to burn the houſes, rather than ſubmit to the terms the pariſhioners inſiſted on. It appeared farther, that the priſoner *Elizabeth* ſet the houſe on fire by the direction of her mother the priſoner *Anne*, who went from home on purpoſe to be abſent at the time the fact was committed; and that no other houſe was burnt.—The jury found both the priſoners guilty. But a doubt ariſing by reaſon of the intereſt the priſoner *Anne* had in the houſe, Mr. juſtice *Deniſon* thought proper to reſpite judgment, in order to take the opinion of the judges, on the caſe. —*July* 2d, 1753, at a meeting of the judges, it was unanimouſly agreed, that both the priſoners were guilty of felony. The only doubt was, with regard to the intereſt the priſoner *Anne* had in the houſe; and it was grounded on the reaſoning in *Holmes*'s caſe: for had ſhe had ſuch eſtate in the houſe as would have cleared her of the charge of the felony, the priſoner *Elizabeth*, who acted by her directions, could not have been guilty of felony.—But all the judges agreed, that the priſoner *Anne*'s title to dower was not ſuch an intereſt as could bring her within the rule in *Holmes*'s caſe. *Holmes* had the poſſeſſion by legal title, and during the continuance of his *298 leaſe could maintain his poſſeſſion againſt all mankind; and *therefore the houſe might in a limited ſenſe be called *his own*. But in the preſent caſe, the poſſeſſion was in *Edward Stokes*, under a demiſe from *Anne* in behalf of her ſon, and ſubject to a yearly rent which

ſhe

ſhe received. And her title to dower, had *Edward Stokes*'s intereſt been out of the caſe, did not ſo much as give her a right of entry, it being a bare right of action. Mr. juſtice *Deniſon* ſaid, that he had no doubt upon him from the beginning. But it being a new caſe, and ſome of the bar being doubtful, he thought it adviſeable to take the opinion of the judges.—At the next aſſizes, judgment of death was pronounced upon both the priſoners; and *Anne* the mother was executed. But *Elizabeth* being young, and acting under her mother's direction, was reprieved, and recommended to mercy on condition of tranſportation.—It was ſaid in the debate of this caſe by ſome of the judges, and not denied by any, that had *Anne* been ſeiſed of the freehold and inheritance of the houſe, and *Stokes* in poſſeſſion under a leaſe, it would have been felony in *Anne* to have burnt it: otherwiſe all tenants and their concerns would be very much at the mercy of their landlords. And the principle the three judges went upon in *Holmes*'s caſe, doth ſeem to warrant this opinion. They conſidered the houſe then under conſideration as the property of *Holmes*, as *his own houſe*, by reaſon of the eſtate he had in it under his leaſe. *Croke* (who differed from them) did not diſpute the principle, but argued againſt the concluſion the other judges drew from it. And if this be ſo, Mr. juſtice *Foſter* ſays, he does not ſee why it may not with ſtrict legal propriety be ſaid of a reverſioner, who ſhould maliciouſly ſet fire to houſes in the poſſeſſion of his tenants under leaſes from himſelf or his anceſtors, that he burned the *houſes of another*. The judgment in *Holmes*'s caſe, to ſay no more of it, was a very merciful judgment. The houſe might with ſtrict legal propriety have been conſidered as the houſe of the landlord. Both landlord and tenant have a property, one temporary and limited, the other abſolute and perpetual; like the perſon to whom goods are delivered, and the abſolute owner thereof, in the caſe of larceny.——Note, it was ſtated in this caſe, that the daughter, who committed the fact at the inſtigation of the mother, was *of the age of* 14, *and of ſufficient diſcretion*. But if the mother had employed, as ſhe threatened ſhe would, the leaſt of her children; then *ſhe* muſt have been indicted as the principal, ſince the child not being of years of diſcretion was innocent. *Foſt.* 113, 349.

*2. By the ſtatutes of 23 H. 8. c. 1. and 25 H. 8. c. 3. No perſon who ſhall be found guilty for wilful burning of any dwelling houſe, or barn wherein any corn ſhall be, nor perſons abetting, procuring, helping, maintaining, or counſelling the ſame ſhall be admitted to the benefit of clergy. *By ſtatute: Burning a dwelling houſe or corn barn.* *299

There hath been much learned debate, how far theſe ſtatutes, which are repealed by 1 Ed. 6. c. 12. are revived by 5 & 6 Ed. c. 10. But as the ſame is enacted in effect by other ſubſequent ſtatutes, it is now not very material.

By the 4 & 5 P. & M. c. 4. Every perſon who ſhall maliciouſly command, hire, or counſel any perſon, wilfully to burn any

dwelling houſe, or any part thereof, or any barn then having corn or grain in the ſame, ſhall not have the benefit of his clergy.

But acceſſaries after ſhall have their clergy. 1 *H. H.* 573.

Burning a barn or ſtack of corn, in the northern counties.

3. Whoever ſhall wilfully and of malice burn, or cauſe to be burned, or aid, procure, or conſent to the burning of any barn, or ſtack of corn or grain, within any of the counties of *Cumberland*, *Northumberland*, *Weſtmorland*, and *Dureſme*, ſhall be guilty of felony without benefit of clergy. And juſtices of the peace in ſeſſions may hear and determine the ſame. 43 El. c. 13.

Burning in the night ſtacks of corn or hay, barns, houſes, kilns.

4. If any perſon ſhall in the night time, maliciouſly, unlawfully, and willingly burn, or cauſe to be burned, or deſtroyed, any ricks or ſtacks of corn, hay, or grain, barns, or other houſes or buildings, or kilns; he ſhall be guilty of felony, but without corruption of blood, or diſinheritance of heirs:

And the judges of aſſize, or three juſtices of the peace (1 Q.) may determine the ſame, ſo that the proſecution be within ſix months:

And the ſaid juſtices, on requeſt of the party injured, ſhall iſſue their warrant for apprehending all ſuch perſons as ſhall be ſuſpected thereof, and take their examination:

And ſhall cauſe all others who to them ſhall ſeem likely to make diſcovery, to appear before them, and give information on oath; yet ſo, as no perſon to be examined ſhall be proceeded againſt for any offence, concerning which he ſhall be examined as a witneſs and ſhall upon his examination make a true diſcovery:

And if ſuch witneſs, being duly ſummoned ſhall refuſe to appear, or to be examined, they may commit him to the common gaol, till he ſubmit to be examined upon oath:

*330 * And they ſhall iſſue warrants for ſummoning jurors:

And if any perſon, being found guilty (in order to avoid judgment of death, or execution thereupon) ſhall make his election to be tranſported, the court ſhall cauſe judgment to be entred that he be tranſported to ſome of the plantations (to be mentioned in the judgment) for ſeven years: and if he ſhall return before the expiration of the term, he ſhall ſuffer death as a felon, and as if no ſuch election to be tranſported had been made by him. 22 & 23 C. 2. c. 7.

Burning by the Black Act.

5. By the 9 G. c. 22. commonly called the Black Act, (which is inſerted more at length under the title *Black Act*;) If any perſon ſhall ſet fire to any houſe, barn, or outhouſe, or to any hovel, cock, mow, or ſtack of corn, ſtraw, hay, or wood; [And by the 10 G. 2. c. 32. ſ. 6. If any perſon ſhall wilfully and maliciouſly ſet on fire any mine, pit, or delph of coal or cannel coal: which offence, by ſ. 4. of this act, is incorporated with the offences

in

in the Black Act] he ſhall be guilty of felony without benefit of clergy.

And the hundred ſhall be chargeable, as in caſes of robbery, for the damages ſuſtained (not exceeding 200l.)

And if any perſon ſhall apprehend, or cauſe to be convicted, any offender, and ſhall be killed, or wounded ſo as to loſe an eye or the uſe of a limb in endeavouring to apprehend him; on proof thereof made at the ſeſſions, and on certificate thereof from thence, he ſhall be entitled to the ſum of 50l. to be paid by the ſheriff in thirty days, the ſame to be repaid to him out of the treaſury.

Houſe burning not bailable.

6. Such as be taken for houſeburning feloniouſly done, are not bailable by juſtices of the peace. 3 Ed. 1. c. 15. 2 Inſt. 189.

Burning a ſhip.

7. If any ſhip officer or mariner ſhall wilfully burn the ſhip to which he belongeth, or procure the ſame to be done, to the prejudice of the owner of the ſhip or goods, he ſhall be guilty of felony without benefit of clergy. 1 Ann. ſt. 2. c. 9.

And by the articles of the navy, 22 G. 2. c. 33. Every perſon who ſhall unlawfully burn or ſet fire to any magazine, or ſtore of powder, or ſhip, boat, ketch, hoy, or veſſel, or tackle or furniture thereunto belonging, not appertaining to an enemy or rebel, ſhall be puniſhed with death, by the ſentence of a court martial. Art. 25.

Burning mills or engines belonging to mines.

8. If any perſon ſhall burn or ſet fire to any wind ſaw mill, or other wind or water mill, or any of the works belonging thereto; he ſhall be guilty of felony without benefit of clergy. And if any perſon ſhall burn or ſet fire * to any machine or engine belonging to any mine; he ſhall be guilty of felony, and tranſported for ſeven years. 9 G. 3. c. 29. *301

Burning wood growing.

9. If any perſon ſhall, by day or by night, in a riotous open, tumultuous, or in a ſecret and clandeſtine manner, forcibly, or wrongfully and maliciouſly, burn any wood, or ſprings of wood, or coppice wood, he ſhall be guilty of felony. 1 G. ſt. 2. c. 48. 6 G. c. 16.

And any two juſtices, or the juſtices in ſeſſions, may cauſe the offender to be apprehended, and hear, and determine and adjudge the offence. 6 G. c. 16.

But if the offender is not known, then the perſon injured ſhall have ſatisfaction from the inhabitants of the pariſhes, towns, or places joining thereon, in the ſame manner as for dikes and hedges overthrown in the night, by the ſtatute of 13 Ed. 1. c. 46. (which enacts, that if it cannot be known by the verdict of aſſize or jury who did the fact, the towns near adjoining ſhall be diſtrained to levy the hedge at their own coſt, and to yield damages) unleſs the offender be by ſuch pariſh, town, or place, convicted in ſix months. 6 G. c. 5.

Burning ling, goſs, furze, or fern.

10. No perſon ſhall on any mountains, hills, heaths, moors, foreſts, chaſes, or other waſtes, burn between *Feb.* 2. and *June* 24, any grig, ling, heath, furze, goſs or fern; on pain of being committed to the houſe of correction for any time not exceeding one month, nor leſs than ten days, there to be whipt, and kept to hard labour. 4 & 5 W. c. 23. ſ. 11.

Burning goſs, furze, or fern in foreſts.

11. If any perſon ſhall ſet fire to, burn, or deſtroy any goſs, furze, or fern, in any foreſt or chaſe without conſent of the owner or perſon chiefly entruſted with the cuſtody of ſuch foreſt or chaſe, or ſome part thereof, or ſhall be aiding therein, and being brought before a juſtice, ſhall be thereof convicted by confeſſion, or oath of one witneſs, or on view of the juſtice, he ſhall forfeit not exceeding 5l, nor leſs than 40s, half to the informer, and half to the poor; if not forthwith paid, to be levied by diſtreſs; and if no ſufficient diſtreſs can be found, the juſtice ſhall commit him to the common gaol for any time not exceeding three months, nor leſs than one month. 28 G. 2. c. 19. ſ. 3.

Burning a laden cart, or fire wood.

12. If any perſon ſhall maliciouſly, willingly, and unlawfully, burn or cauſe to be burnt, any wain or cart, laden with coals, or with any goods or merchandizes; or any heap of wood prepared, cut, or felled for making coals, or billets, or tal-

*392 wood; he ſhall forfeit treble * damages to the party grieved, to be recovered by action of treſpaſs: and alſo 10l, as a fine to the king. 37 H. 8. c. 6. ſ. 4.

Puniſhment of a ſervant careleſly firing a houſe.

13. If any ſervant, through negligence or careleſſneſs, ſhall fire or cauſe to be fired any dwelling houſe, or outhouſe or houſes, and be thereof convicted on the oath of one witneſs before two juſtices, he ſhall forfeit 100l, to the churchwardens of the pariſh where the fire ſhall happen, to be diſtributed by them to the ſufferers, in ſuch proportions as to them ſhall ſeem juſt; and if he do not pay the ſame immediately on demand to the churchwardens, the ſaid juſtices ſhall commit him to ſome workhouſe or houſe of correction for eighteen months, there to be kept to hard labour 6 An. c. 31.

And by 14 G. 3. c. 78. ſ. 84. If any ſervant through negligence ſhall fire, or cauſe to be fired any dwelling houſe, outhouſe, or other building, on being lawfully convicted, before two or more juſtices, ſhall forfeit and pay 100l to the churchwardens or overſeers of the pariſh where ſuch fire ſhall happen, to be diſtributed among the ſufferers: And in caſe of non payment, immediately after conviction, ſhall by warrant under the hands and ſeals of two or more juſtices, be committed to the common gaol or houſe of correction, for the ſpace of 18 months, there to be kept to hard labour.

14. By the commiſſion of the peace, any juſtice may cauſe to come before him, all thoſe who to any of the people concerning the firing of their houſes have uſed threats, to find ſufficient ſecurity for the peace or their good behaviour towards the king and his people; and if they ſhall refuſe to find ſuch ſecurity, may cauſe them to be ſafely kept in the king's priſons, until they ſhall find ſuch ſecurity. *Threatning to burn a houſe.*

And by the 9 G. c. 22. If any perſon ſhall ſend any letter without any name ſubſcribed thereto, or ſigned with a fictitious name, threatning to burn any houſe, outhouſe, barn, ſtack of corn or grain, hay or ſtraw; he ſhall be guilty of felony without benefit of clergy.

Burying in Woollen. See *Woollen Manufacture.*

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*BUTCHER.

1. IF any butchers ſhall conſpire not to ſell their victuals but at certain prices; every ſuch perſon ſhall forfeit for the firſt offence 10l to the king, and if not paid in ſix days, he ſhall ſuffer twenty days impriſonment, and ſhall only have bread and water for his ſuſtenance; for the ſecond offence 20l in like manner, or the pillory; and for the third offence 40l or pillory, and the loſs of an ear, and to be taken as a man infamous, and not to be credited in any matter of judgment. And the ſeſſions or leet may determine the ſame. 2 & 3 Ed. 6, 15. *Conſpiring to raiſe the price of victuals.*

2. No butcher ſhall ſlay any beaſt within any walled town, except *Carliſle* and *Berwick*; on pain of forfeiting for every ox 12d, every cow and other beaſt 8d, half to the king, and half to him that will ſue. 4 H. 7. c. 3. *Not to kill in a walled town.*

3. A butcher that ſelleth ſwines fleſh meazled, or fleſh dead of the murrain, ſhall for the firſt time be grievouſly amerced, the ſecond time ſuffer judgment of the pillory, the third time be impriſoned and make fine, and the fourth time forſwear the town. Ordinance for bakers. *Hawk. Stat. V.* 1. *p.* 181. *Selling unwholeſome fleſh.*

4. If any butcher ſhall kill or ſell any victual on the Lord's day, he ſhall forfeit 6s 8d, one third to the informer, and two thirds to the poor, on *Not to kill or ſell on the Lord's day.*

conviction before one juſtice, on his own view, or confeſſion, or oath of two witneſſes, to be levied by the conſtable or churchwarden. 3 C. c. 1.

Not to water hides.

5. No butcher ſhall water any hide, except in *June*, *July*, and *Auguſt*; on pain of 3s 4d for each offence; one third to the king, one third to the informer, and one third to the town or lord of the liberty. 1 J. c. 22. ſ. 2, 50.

And the ſeſſions or leet may hear and determine the ſame. ſ. 50.

Or, any two juſtices, near the place, may (in three months after the offence committed) ſummon the party accuſed, and the witneſſes; and upon the party's appearance, or contempt in not appearing, on proof of notice given, may examine the witneſſes on oath, and give judgment, and iſſue warrants under their hands to levy the penalty by diſtreſs; and, if not redeemed in ſix days, the ſame to be ſold. They may alſo mitigate the penalties, ſo as they reduce them not to leſs than a fourth part, over and above the coſts and charges. And any perſon aggrieved may appeal to the next ſeſſions, who may finally determine * the ſame; and in
* 304 caſe of conviction, iſſue warrants for levying the penalties. 9 An. c. 11. ſ. 36, 37.

Selling rotten hides.

6. No butcher ſhall put to ſale any hide putrified or rotten; on pain of 3s 4d for each offence, in like manner. 1 J. c. 22. ſ. 2.

Exerciſing the trade of a tanner.

7. No butcher ſhall be a tanner or currier; on pain of 6s 8d a day, to be recovered and levied in like manner. 1 J. c. 22. ſ. 2, 25.

Gaſhing hides.

8. If any raw hide ſhall wilfully or negligently be gaſhed, in the flaying thereof; or being gaſhed, be offered to ſale by any butcher or other; the offender ſhall forfeit 2s 6d for ſuch hide, and 1s for a calf ſkin; half to the poor, and half to the informer: To be levied by two juſtices in like manner. 9 An. c. 11. ſ. 11.

BUTTER AND CHEESE.

I. Concerning the packing, weight, and goodneſs of butter.

II. Concerning the ſhipping of butter and cheeſe for London.

I. Concerning the packing, weight, and goodneſs of butter.

Weight of the caſk to be marked.

1. EVERY farmer and other perſon packing up butter for ſale, ſhall ſet upon every firkin and caſk, when the ſame is fully ſeaſoned in water, a continuing viſible mark of the juſt weight of the empty caſk; on pain of forfeiting for every offence the ſum of ten ſhillings for every hundred weight of butter otherwiſe packed, and ſo proportionably for a greater or leſſer quantity; half to the churchwardens and overſeers for the uſe of the poor, and half with double coſts to him who ſhall ſue for the ſame in ſeſſions, by action of debt, indictment, information, or preſentment. 13 & 14 C. 2. c. 26. ſ. 5, 6.

Weight of a pot to be marked.

2. Alſo every potter ſhall ſet upon every pot which he ſhall ſell for packing up butter, the juſt weight of the pot when it is burnt, together with the firſt letter of his chriſtian name, and his ſurname at length; on pain of 1s. And no perſon ſhall expoſe to ſale any butter packed up in any pot not ſo marked, on pain of 2s for every ſuch pot. * To be recovered and applied in like manner. 13 & 14 C. 2. c. 26. ſ. 6. * 305

Weight and goodneſs.

3. Every kilderkin of butter ſhall contain 112 pounds, and every firkin 56 pounds neat, or above: every pound containing 16 ounces, beſides the tare of the caſk, of good and merchantable butter; and every pot of butter ſhall contain 14 pounds neat, or above, beſides the weight of the pot;

And no butter which is old or corrupt ſhall be mixed or packed up with any butter which is new and ſound;

Nor any whey butter ſhall be packed or mixed with any butter made of cream;

And every caſk or pot of butter ſhall be of one ſort and goodneſs;

And no butter ſhall be ſalted with any great ſalt, but ſhall be ſalted and ſaved with ſmall ſalt; nor more ſalt ſhall be intermixed with it than ſhall be needful for its preſervation.

On pain that every owner, farmer, or packer of butter, not putting up in each kilderkin, firkin, and pot, to be ſold or expoſed

to

to ſale, ſuch quantities as aforeſaid, or offending in falſe packing as aforeſaid, for every offence ſhall forfeit the value of all the butter ſo falſe packed; and for every offence where any kilderkin, firkin, or pot ſhall be found to contain a leſſer quantity of butter than as above, ſix times the value of every pound of butter that ſhall be wanting in ſuch caſk or pot; to be recovered and applied as aforeſaid. 13 & 14 C. 2. c. 26. ſ. 2.

Owner to ſet his name on the caſk.

4. And when the farmer or other perſon hath filled the caſk with butter, he ſhall beſides the former mark of the weight of the caſk, ſet alſo on the caſk the firſt letter of his chriſtian name, and his ſurname at length with an iron brand; on pain of forfeiting for every offence the ſum of 10s, for every hundred weight of butter otherwiſe packed, and for more or leſs proportionably; to be recovered and applied in like manner. 13 & 14 C. 2. c. 26. ſ. 5.

Cheeſemonger to deliver due quantity and quality.

5. And every cheeſemonger and other who ſhall ſell any kilderkin, firkin, pot, or other caſk of butter, ſhall deliver therein the full quantity and due quality; or ſhall be liable to make ſatisfaction, according to the price thereof. 13 & 14 C. 2. c. 26. ſ. 3.

Cheeſemonger ſhall not repack butter.

6. And no cheeſemonger or other perſon ſhall repack for ſale, any butter, in any kilderkin, firkin, or other caſk, or pot, on pain of forfeiting double value thereof; to be recovered and applied in like manner. 13 & 14 C. 2. c. 26. ſ. 4.

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In what time the proſecution ſhall be.

* 7. The proſecution for the offences above, ſhall be commenced in four months after the ſale of the butter. 13 & 14 C. 2. c. 26. ſ. 7.

Proſecution not to be, if the buyer hath approved it.

8. But provided nevertheleſs, that no ſeller of butter ſhall be charged with any of the ſaid penalties, after the buyer hath bought the butter and approved it. 4 W. c. 7. ſ. 2.

Fraud after ſale, by the ſeller.

9. And for preventing any fraud in the ſeller, after the factor or buyer hath bought the butter, the ſaid factor or buyer ſhall ſet his ſeal, or mark, or name upon it, or upon the caſk; and if it ſhall be afterwards exchanged or opened, and the caſk changed, or any bad butter mixed or packed up with good butter, or any other fraud be committed by the ſeller; and he be convicted thereof, before one juſtice, by oath of one witneſs, or confeſſion, he ſhall forfeit 20s for every firkin and offence, to be levied by the conſtable, by diſtreſs, and to be diſtributed by the juſtice, half to the churchwardens and overſeers for the uſe of the poor, and half to the informer. 4 W. c. 7. ſ. 3.

But

But any perſon aggrieved may appeal to the next ſeſſions, giving 20l. bond to the party, to pay coſts (in a month after) if he is not relieved on his appeal. *id.* ſ. 10.

II. *Concerning the ſhipping of butter and cheeſe for* London.

1. Every warehouſekeeper, weigher, ſearcher, or ſhipper of butter and cheeſe, ſhall receive all butter and cheeſe that ſhall be brought to him for the *London* cheeſemongers, and ſhip the ſame without undue preference; and ſhall have for his pains 2s 6d for every load: and if he ſhall make default, he ſhall, on conviction before one juſtice, on oath of one witneſs, or confeſſion, forfeit for every firkin of butter 10s, and for every weigh of cheeſe 5s, half to the churchwardens and overſeers for the uſe of the poor, and half to the informer, to be levied by the conſtable by diſtreſs and ſale. 4 W. c. 7. ſ. 4. *No undue preference.*

2. And he ſhall keep a book of entry of receiving and ſhipping the goods; on pain of 2s 6d for every firkin of butter, and weigh of cheeſe, to be levied and applied in like manner; and for want of diſtreſs, to be committed till paid. 4 W. c. 7. ſ. 5. *Book of entry.*

3. A maſter of a ſhip refuſing to take in butter or cheeſe, before he is full laden (except it be a cheeſemonger's own ſhip ſent for his own goods), ſhall forfeit for every firkin of butter refuſed 5s, and for every weigh * of cheeſe 2s 6d, to be levied and applied in like manner. 4 W. c. 7. ſ. 6. *Maſter of a ſhip refuſing to take in.* * 307

4. Perſon aggrieved by the determination of the juſtice, may appeal to the next ſeſſions, giving 20l bond with one or more ſureties, to the party, to pay coſts (within a month after) if he is not relieved on his appeal. 4 W. c. 7. ſ. 10. *Appeal.*

5. But this act ſhall not extend to any warehouſe in *Cheſhire* or *Lancaſhire*. 4 W. c. 7. ſ. 9. *Exception.*

Note; There are ſpecial directions in the act of 8 G. c. 27. concerning the ſelling of butter in the city of *York*, and the act of the 17 G. 2. c. 8. concerning the ſame in *New Malton*; which are not general enough to be here inſerted.

BUTTONS.

Foreign buttons. 1. NO perſon ſhall ſell or offer to ſale, or import, any foreign bone lace, cut-work, embroidery, fringe, band ſtrings, buttons, or needle-work, made of thread and ſilk, or either of them, or any foreign buttons whatſoever; on pain that he who ſhall offer them to ſale ſhall forfeit the ſame and 50l, and the importer ſhall forfeit the ſame and 100l, half to the king, and half to him that ſhall ſue. 13 & 14 C. 2. c. 13. ſ. 2. 4 W. c. 10. ſ. 2.

And on complaint and information given to a juſtice of the peace, at times reaſonable, he ſhall iſſue his warrant to the conſtable, to enter and ſearch for ſuch manufactures in the ſhops being open, or warehouſes, and dwelling houſes of ſuch perſons as ſhall be ſuſpected, and to ſeize the ſame. 13 & 14 C. 2. c. 13. ſ. 3. 4 W. c. 10. ſ. 3.

And foreign lace and needle-work condemned, ſhall not be ſold or delivered out of the warehouſe wherein the ſame ſhall be ſecured, otherwiſe than on condition of exportation. 7 G. 3. c. 47. ſ. 9.

And *Engliſh* bone-lace, needle work, point, or cut work, may be exported cuſtom free. 11 & 12 W. 3. ſ. 15.

Wooden buttons. 2. No perſon ſhall make, ſell, or ſet on any buttons made of wood only, and turned in imitation of other * buttons; on pain of 40s a dozen, half to the king, and half to him that ſhall ſue in any court of record. 10 W. c. 2.

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Made of wood only] H. 13 W. *King* and *Roberts*. An information was exhibited againſt the defendant, for having made wooden buttons, contrary to the ſtatute. Upon trial, the jury found a ſpecial verdict, that all the button was of wood, but there was in it a ſhank of wire. And after argument, judgment was given for the king, namely, that this was a button of wood, notwithſtanding the ſhank, which is no eſſential part of buttons; for buttons of ſilk and hair have no ſhanks. Lord *Raym.* 712.

Cloth buttons. 3. By the ſaid act of the 10 W. c. 2. No perſon ſhall make, ſell, or ſet on, any buttons made of cloth, ſerge, drugget, frize, camlet, or other ſtuffs of which clothes are uſually made on pain of 40s a dozen, half to the king, and half to him that ſhall ſue in any court of record.

And by the 8 An. c. 6. No taylor or other perſon ſhall make, ſell, ſet on, uſe, or bind on any clothes, any buttons, or button-holes, made of or uſed, or bound with ſerge, drugget, frize, camlet, or other ſtuffs of which clothes are uſually made; on pain of 5l. a dozen, half to the king, and half to him that ſhall ſue in any court of record; or on complaint to two juſtices, they may ſummon

mon witneſſes, and levy the penalty, and return the overplus if any be, and if any perſon is aggrieved, he may appeal to the next ſeſſions.

But by this act no power is given to make diſtreſs. The next that occurs, is the ſtatute of 4 G. c. 7. which in the ſtatutes at large is a looſe, injudicious, and ungrammatical act, and by its garb may well enough ſeem to have been drawn up by the taylors or button-makers; whereby it is enacted as follows:

No taylor or other perſon ſhall make, ſell, ſet on, or bind on any clothes, any buttons, or button-holes made of, or uſed, or bound with cloth, ſerge, drugget, frize, camlet, or any ſtuffs that clothes are uſually made of (velvet excepted); on pain of 40s a dozen: To be determined by one juſtice where the offence ſhall be diſcovered, or the offender ſhall inhabit, on oath of one witneſs, in three months after the offence committed; and to be diſtributed (charges of conviction firſt deducted) half to the informer, and half to the poor of the pariſh or place where the offence ſhall be diſcovered: if not paid (being lawfully demanded) in 14 days after conviction, the juſtice ſhall iſſue his warrant to the conſtable where the offender dwells, * or can be found, to levy it by diſtreſs and ſale; and where no ſufficient diſtreſs can be found, he ſhall be committed to the common gaol of the county or place where he ſhall be found, to be kept to hard labour for three calendar months. Perſons aggrieved may appeal to the ſeſſions, giving ſufficient notice; and the ſeſſions may allow coſts to the party aggrieved. * 309

And taylors cauſing their apprentices or ſervants to make ſuch clothes, ſhall themſelves be ſubject to the penalties.

And all ſuch clothes, made with ſuch buttons and button-holes, *expoſed to ſale*, ſhall be forfeited and ſeized, and recovered and diſpoſed of as the other penalties.

And by the ſtatute of the 7 G. ſt. 1. c. 12. No perſon ſhall *uſe or wear* on any clothes (velvet excepted) any ſuch buttons or button-holes; on pain of 40s a dozen, on conviction by confeſſion, or oath of one witneſs; and any juſtice of the peace, where the offence ſhall be committed, or the offender ſhall inhabit, ſhall on complaint or information on oath, of any credible perſon, in one month after the offence, ſummon the party, and on his appearance or contempt, examine the matter, and on due proof by confeſſion, or oath of one witneſs, convict the offender, and cauſe the forfeiture by his warrant to be levied by diſtreſs and ſale; the ſaid penalties to be half to him on whoſe oath the party ſhall be convicted, and half to the poor of the pariſh where the offence ſhall be committed. And perſons aggrieved may appeal to the next quarter ſeſſions, giving 8 days notice.

To him on whoſe oath the party ſhall be convicted] This is almoſt the only inſtance where a ſhare of the penalty is given in expreſs words, in a popular action, to the party on whoſe oath any perſon is convicted; and the contrary doctrine ſeems generally to prevail, that the defendant ſhall not be condemned upon the ſole teſtimony of

the plaintiff ſwearing for his own intereſt: And it is certainly againſt the common law, that ſuch a perſon ſhould be a witneſs at all; and therefore his right to give evidence in his own cauſe, and the power to convict the defendant upon that ſole evidence, muſt depend on the expreſs words of ſome ſtatute.—Not to mention, that here is no diſpoſal of one moiety of the penalty; if the party is convicted by his own *confeſſion*.

I. By the common law.
II. By ſtatute.

I. By the common law.

IT ſeemeth to be an high offence at common law, to buy or ſell any doubtful title to lands known to be diſputed, to the intent that the buyer may carry on the ſuit, which the ſeller doth not think it worth his while to do, and on that conſideration ſells his pretenſions at an under rate: and it ſeemeth not to be material whether the title ſo ſold be a good or bad one, or whether the ſeller were in poſſeſſion or not, unleſs his poſſeſſion were lawful and uncontеſted; for all practices of this kind are by all means to be diſcountenanced, as manifeſtly tending to oppreſſion, by giving opportunities to great men to purchaſe the diſputed titles of others, to the great grievance of the adverſe parties, who may often be unable or diſcouraged to defend their titles againſt ſuch powerful perſons, which perhaps they might ſafely enough maintain againſt their proper adverſary. 1 *Haw.* 261.

II. By ſtatute.

1. By the ſtatute of 13 Ed. 1. c. 49. "No perſon of the king's "houſe ſhall buy any title whilſt the thing is in diſpute; on pain "of both the buyer and ſeller being puniſhed at the king's plea-"ſure."

2. And

2. And by 32 H. 8. c. 9. "None ſhall buy any pretenced "right in any land, unleſs the ſeller hath been in poſſeſſion of the "ſame, or of the reverſion or remainder thereof, or taken the "rents and profits thereof, for one year next before; on pain "that the ſeller ſhall forfeit the land, and the buyer the value, "half to the king, and half to him that ſhall ſue within one year." ſ. 2, 6.

Pretenced title] But he who is in lawful poſſeſſion may purchaſe the pretended title of any others. 32 H. 8. c. 9. ſ. 4.

One year before] But no conveyance made by one who hath the unconteſted poſſeſſion, and undiſputed abſolute * propriety of lands, *311 is any way within the meaning of this ſtatute. 1 *Haw.* 265.

3. "And the offence of buying of titles may be laid in any "county at the pleaſure of the informer." 31 El. c. 5. ſ. 4.

Cabbages; Stealing: The ſame penalty as for ſtealing turnips. For which, ſee the Title *Turnips*.

Callico. See *Exciſe*.
Cambricks. See *Linen*.
Candles. See *Exciſe*.
Capias. See *Proceſs*.

CARDS AND DICE.

1. BY the 10 Ann. c. 19. No playing cards or dice ſhall be imported. *Importation prohibited.*

2. By the 9 An. c. 23. Shall be paid, for every pack of cards made in Great Britain, a duty of 6d. By 29 G. 2. c. 13. a further duty of 6d. And by 16 G. 3. c. 34. a further duty of 6d. *Duty on cards and dice.*

And by 9 An. c. 23. for every pair of dice 5s. By 29 G. 2. c. 13. a further duty of 5s. And by 16 G. 2. c. 34. a further duty of 2s 6d.

The ſame to be under the management of the commiſſioners of the ſtamp duties.

3. All makers of cards or dice, before they begin to make them, ſhall give notice in writing of the houſe or place where they intend to make them, to the commiſſioners or their officer next adjacent, *Places of making to be entered.*

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on pain of 50l. 9 An. c. 23. ſ. 41. And alſo all the cards, dice, materials, and utenſils ſhall be forfeited. 10 An. c. 19. ſ. 166.

Providing materials.

4. And every maker of cards ſhall ſend to the commiſſioners a ſufficient quantity of paper, in order to have as many aces of ſpades impreſſed thereon as ſuch maker ſhall deſire; and every pack of cards ſhall have one ſuch ace ſo impreſſed: And the commiſſioners ſhall cauſe a ſtamp to be prepared, with ſuch device as they ſhall think proper, to denote the ſaid ace of ſpades, as well in every pack made for uſe in Great Britain, as in every pack
*312 made for * exportation; ſo as in ſuch device there be ſome diſtinguiſhing mark, between cards for home, and cards for foreign conſumption. 5 G. 3. c. 46. ſ. 9.

And the maker ſhall alſo ſend to the commiſſioners or their officers, jews or wrappers made for incloſing cards for uſe in Great Britain, with his name and any other particular word or thing printed thereon, as the commiſſioners ſhall direct; in order that the ſame may be ſtamped and delivered again, from time to time, to ſuch maker, as occaſion ſhall require: And the commiſſioners ſhall denote one of the ſix-penny duties charged on cards in Great Britain, on ſuch jew or wrapper. 5 G. 3. c. 46. ſ. 10.

Officers may enter and ſearch.

5. And the officers may enter any houſe or place where cards or dice are made, ſold, or expoſed to ſale, or ſuſpected to be privately made, or into any publick gaming houſe, room, or place, and there ſearch and ſee what quantity of cards or dice ſhall be making, and whether they be ſtamped; and if the owner or occupier ſhall refuſe entrance or liberty of ſearch, he ſhall forfeit 10l. 10 An. c. 19. ſ. 169.

And if the commiſſioners be informed, or have cauſe to ſuſpect, that any perſon makes cards or dice in a place not entred, on affidavit thereof by the informer before a juſtice of the peace declaring the grounds of his ſuſpicion; the officer may in the day time, and in the preſence of a conſtable by warrant of ſuch juſtice break open the door, or any part of ſuch private place, and enter, and ſeize all ſuch cards, dice, tools, or materials, and if not replevied in five days, they ſhall be forfeited and ſold. 6 G. 2. c. 21. ſ. 59.

Materials not to be removed till finiſhed.

6. And no materials begun to be wrought for cards or dice, ſhall be removed until they be compleatly made, or the duties paid; on pain of double duty. 10 An. c. 19. ſ. 166.

And no maker of cards or dice ſhall remove the ſame from the place of making, until ſuch mark upon the dice, and ſuch ſeal upon the paper and thread incloſing every pack of cards ſhall be put thereon, as the commiſſioners ſhall appoint; on pain of forfeiting the ſame and treble value. 9 An. c. 23. ſ. 41.

7. The

7. The makers of cards and dice ſhall once in every 28 days make entry upon oath with the proper officer, of all the cards and dice by them made within the ſaid time; on pain of 20l. 9 An. c. 23. ſ. 42. *Entry and payment of the duties.*

And ſhall once in every ſix weeks clear off the duties; on pain of double duty. *id.*

* 8. And no cards or dice ſhall be expoſed to ſale, or uſed in play in any publick gaming houſe, unleſs the paper and thread incloſing the ſame ſhall have been reſpectively ſealed and ſtamped, and unleſs one of the cards of each pack ſhall be alſo ſtamped on the ſpotted ſide; on pain that every perſon who ſhall expoſe to ſale any ſuch cards or dice not ſtamped, ſhall forfeit for every ſuch pack, and for every one of ſuch dice, 5l, with full coſts. 10 An. c. 19. ſ. 162. *Selling or uſing unſtamped.* * 313

9. If any maker ſhall uſe in the making up of any pack of cards, any ace of ſpades, jew, or wrapper, that has been uſed before; he ſhall forfeit 20l. 5 G. 3. c. 46. ſ. 13. *Altering ſtamps.*

And if any perſon ſhall ſell or buy any ſuch ace of ſpades, jew, or wrapper, in order to be made uſe of for the incloſing any pack or parcel of cards; he ſhall forfeit 20l. And if either the buyer or ſeller ſhall inform againſt the other; his evidence ſhall be admitted, and he ſhall be indemnified. ſ. 14, 15.

And if any perſon ſhall take off the ſtamp of any playing cards, or outſide paper of any parcel or pack of cards, with intent to uſe the ſame again; he ſhall be guilty of felony, and tranſported for any time not exceeding ſeven years. 12 G. 3. c. 48.

10. If any perſon ſhall ſell any cards called waſte cards, unleſs before ſale he mark the back or plain ſide of every ſuch card, ſo as to render it unfit to be uſed in playing; he ſhall forfeit 20l. 29 G. 2. c. 13. ſ. 10. *Selling waſte or ſecond-hand cards.*

And if any perſon ſhall ſell any cards, by way of ſecond hand cards, in packs or parcels, after the wrapper or cover ſhall have been broke open, unleſs before ſale he mark the backſide of every card ſo as to render it unfit for play; he ſhall forfeit 5l. for each pack. 16 G. 3. c. 34.

11. If any perſon ſhall counterfeit the ſtamps on cards or dice, or on any jew, wrapper, or thread incloſing the ſame; or knowingly ſell the ſame with a counterfeit ſtamp; or fraudulently uſe any of the ſtamps provided by the commiſſioners; he ſhall be guilty of felony without benefit of clergy. 10 An. c. 19. ſ. 163. 29 G. 2. c. 13. ſ. 5. 5 G. 3. c. 46. ſ. 10. *Counterfeiting ſtamps.*

12. In the caſe of exportation, it ſhall be lawful to remove cards or dice from the place where they are made, without ſtamping or paying duty, provided that within a month after they are made, and before they be removed, *Exportation.*

bond

bond of double duty be given, that they ſhall be exported and not relanded. 10 An. c. 19. ſ. 170. 5 G. c. 19. ſ. 48.

But cards intended for exportation ſhall before packing for ex-
*314 portation be incloſed in paper and thread, in * packs or parcels, and be marked on the ſpotted ſide, in ſuch manner as the commiſſioners ſhall direct; and if any perſon ſhall ſell or expoſe to ſale to be uſed in Great Britain, or ſhall uſe or permit to be uſed in any publick gaming houſe, any cards ſo marked as for exportation; he ſhall forfeit 20l for every ſuch pack. 29 G. 2. c. 13. ſ. 6.

And if any perſon ſhall reland, or procure to be relanded, any parcel of cards, after having been entered and ſhipped for exportation; he ſhall forfeit 50l. And if any perſon concerned ſhall inform againſt an accomplice; he ſhall be admitted to give evidence, and himſelf be indemnified. 5 G. 3. c. 46. ſ. 16, 17.

And if any perſon ſell cards (by way of ſecond hand cards) fit to play with, after the cover is broke open, he ſhall forfeit 5l. to be recovered, &c. as by 29 G. 2. 16 G. 3. c. 34. ſ. 17.

CARRIERS.

Carrier, who.

1. ALL perſons carrying goods for hire, as maſters and owners of ſhips, lightermen, ſtage-coachmen, and the like, come under the denomination of common carriers; and are chargeable on the general cuſtom of the realm, for their faults or miſcarriages. 1 *Bac. Abr.* 343.

Rates for carriage.

2. By the 3 W. c. 12. The juſtices in *Eaſter* ſeſſions yearly, ſhall rate prices of all land carriage of goods to be brought *into* any place within their juriſdiction, by any common waggoner or carrier; and ſhall certify the rates ſo made to the mayors and other chief officers of the ſeveral market towns within their juriſdiction, to be hung up in ſome publick place to which all perſons may reſort: And no ſuch common waggoner or carrier ſhall take for carriage above the rates ſo ſet, on pain of 5l, by diſtreſs, by warrant of two juſtices where ſuch waggoner or carrier ſhall reſide, to the uſe of the party grieved. ſ. 24.

And by 21 G. 2. c. 28. If any common waggoner or carrier ſhall demand and take any greater price for bringing goods *to* London, or to any place within the bills of mortality, than is allowed and ſettled by the juſtices for the place from whence the ſame are brought

brought for the carrying of goods *from* London to the ſaid place; he ſhall forfeit 5l. to the party grieved, to be recovered as by the
* ſaid act of the 3 W. or by diſtreſs and ſale of his goods, by war- *315
rant from two juſtices of *Middleſex*, *Surry*, *London*, or *Weſtminſter*. ſ. 3.

And the clerk of the peace in the country ſhall, immediately after *Eaſter* ſeſſions yearly, certify to the lord mayor of *London*, and to the reſpective clerks of the peace for *Middleſex*, *Surry*, and *Weſtminſter*, the rates made for the carriage of goods, in their reſpective counties and places; which certificate, or an atteſted copy thereof, ſigned by the officer to whom the ſame ſhall be tranſmitted, ſhall be ſufficient evidence of the prices ſo ſet. ſ. 3.

And every common waggoner or carrier ſhall have his chriſtian and ſurname and place of abode, in large or capital letters, placed upon ſome conſpicuous part of his carriage, before he ſhall drive the ſame; on pain of 20s, to be levied and recovered as aforeſaid. ſ. 4.

[Note; This act of the 21 G. 2. c. 28. ſtands repealed, by the 7 G. 3. c. 40. & 13 G. 3. c. 84. by miſtake, as it ſeemeth; for the repeal was intended, moſt probably, only for ſo much of the ſaid act as relates to turnpike roads, and not for what relates to the price for carriage of goods.]

A carrier ſhall not evade the law, by refuſing to carry goods at the prices limited. For if a common carrier, who is offered his hire, and who hath convenience, refuſes to carry goods, he is liable to an action in the ſame manner as an innkeeper who refuſes to entertain a gueſt, or a ſmith who refuſes to ſhoe a horſe. 1 *Bac. Abr.* 344.

So an action will lie againſt a common ferryman, who refuſeth to carry paſſengers. *id.*

But if the porter puts up the box of a paſſenger behind a ſtage coach, and the maſter, as ſoon as he knows of it ſays, he is already full, and refuſes to take the charge of it, the maſter ſhall not be liable. For this is the ſame with an hoſt who refuſeth his gueſt, his houſe being full, and yet the party ſays he will ſhift, or the like, if he be robbed, the hoſt is diſcharged. *id.*

So a carrier may refuſe to admit goods into his ware-houſe at an unſeaſonable time, or before he is ready to take his journey; but he cannot refuſe to do the duty incumbent upon him by virtue of his publick employment. Ld. *Raym.* 652.

3. No carrier with any horſe or horſes, nor waggonman, carman, or wainman, with their reſpective carriages, ſhall by themſelves, or any other, travel on the Lord's day, on pain of 20s, on conviction in ſix months, * before one juſtice (or mayor), on *316
view, or confeſſion, or oath of two witneſſes, to be levied by the conſtable or churchwardens by diſtreſs; to the uſe of the poor, except that the juſtice may reward the informer with any ſum not exceeding a third part. 3 C. c. 1.

Carrier travelling on Sundays.

Carrier imbezilling goods.

4. It hath been holden, that a carrier imbezilling goods which he has received to carry to a certain place, is not guilty of felony, becauſe there was not a felonious *taking*; but is liable only to a civil action. 1 *Haw.* 89, 90.

Carrier opening a pack.

5. But it hath been reſolved, that if a carrier open a pack, and take out part of the goods, with intent to ſteal it, he may be guilty of felony; in which caſe it may be ſaid, not only that ſuch poſſeſſion of a part diſtinct from the whole, was gained by wrong, and not delivered by the owner; but alſo that it was obtained baſely, fraudulently, and clandeſtinely, in hopes to prevent its being diſcovered at all, or fixed upon any one when diſcovered. 1 *Haw.* 90.

Carrier ſtealing goods after brought to the place.

6. Alſo it ſeems clear, that if a carrier, after he has brought the goods to the place appointed, take them away again ſecretly, with intent to ſteal them, he is guilty of felony; becauſe the poſſeſſion, which he received from the owner, being determined, his ſecond taking is in all reſpects the ſame, as if he were a mere ſtranger. 1 *Haw.* 90.

Carrying to another place.

7. Alſo it hath been reſolved, if goods be delivered to a carrier, to be carried to a certain place, and he carries them to another place, and diſpoſeth of them to his own uſe, that this is felony; becauſe this declareth that his intention originally was not to take the goods, upon the agreement and contract of the party, but only with a deſign of ſtealing them. *Kelynge*, 82.

Carrier robbed.

8. Where goods are delivered to a carrier, and he is robbed of them, he ſhall be charged, and anſwer for them, by reaſon of the hire: And this was at the common law, before the hundred was anſwerable over to him; becauſe ſuch robbery might be, by conſent and combination, carried on in ſuch a manner, that no proof could be had of it. 1 *Salk.* 143.

And altho' it may be thought a hard caſe, that a poor carrier who is robbed on the road, without any manner of default in him, ſhould be anſwerable for all the goods he takes; yet the inconvenience would be far more intolerable, if he were not ſo, for it would be in his power to combine with robbers, or to pretend a robbery, or ſome other accident, without a poſſibility of remedy to the
* 317 * party; and the law will not expoſe him to ſo great a temptation, but he muſt be honeſt at his peril. 12 *Mod.* 482.

Carriers are accountable in caſe of fire.

M. 25 G. 3. *Forward* v. *Pittwood.* This was a ſpecial caſe reſerved for the opinion of the court. The defendant was a common carrier, to whom the plaintiff had delivered a parcel of hops, to be carried by the defendant's waggon. The defendant put them into his warehouſe, and during the night a fire broke out in the adjoining houſe, which communicated to, and burned the

the defendant's warehouſe and the plaintiff's goods therein. The queſtion before the court was, whether the plaintiff was entitled to recover.—The caſe was argued by *Bond* for the plaintiff, and *Burrough* for the defendant.—By L. *Mansfield*. Upon all the caſes for one hundred years and more, it is moſt clear there are events in which the carrier is anſwerable, tho' not guilty of any neglect. By the nature of the contract, he obliges himſelf to uſe all due care and diligence, and is anſwerable for any neglect. But there is ſomething more impoſed upon him by the cuſtoms, that is by the common law. *A common carrier is in the nature of an inſurer*; all the caſes ſhew him to be ſo. This makes him liable to every thing except the act of God, and the king's enemies, that is, even for inevitable accidents, with thoſe exceptions. The queſtion then is, *what is the act of God?* I conſider it to be laid down in oppoſition to the act of *man*; ſuch as lightnings, ſtorms, tempeſts, and the like, which could not happen by any human intervention. To prevent litigation and colluſion, the law preſumes negligence except in theſe circumſtances. An armed force, tho' ever ſo great and irreſiſtable, does not excuſe: The reaſon is, for fear it may give room for colluſion, which can never happen with reſpect to the act of God. We all, therefore, are of opinion, that there ſhould be judgment for the plaintiff. *M. S.*

Otherwiſe loſing or damaging goods.

9. And generally, if a man delivers goods to a common carrier, to carry to a certain place; if he loſes or damages them, an action upon the caſe lies againſt him: for by the cuſtom of the realm, he ought to carry them ſafely. 1 *Bac. Abr.* 343.

And if he be a common carrier, tho' there be no agreement, or rate ſettled, or promiſe of payment; yet he ſhall recover his hire on a *quantum meruit*, and therefore ſhall be liable for loſs and damages. *id.*

Alſo if a perſon, who is no common carrier, takes upon himſelf to carry my goods, tho' I promiſe him no reward, yet if my goods are loſt or damaged by his default, I ſhall have an action againſt him. *id.*

* For the very taking of the goods is a general conſideration, tho' he be not a common carrier: and the acceptance of the goods makes him liable. *Show.* 104. * 318

Who ſhall have action for goods loſt.

10. M. 11 G. 3. *Davis* & *James*. On an action againſt a common carrier, the queſtion was, In whoſe name the action ought to have been brought. The declaration charged, that the plaintiff being poſſeſſed of cloth, as of his own proper goods, delivered the ſame to the defendant to be carried to London and delivered to a certain perſon there. The goods were loſt, and the plaintiff obtained a verdict againſt the carrier. It was moved for a new trial, on the objection, that the action ought to have been brought in the name of the perſon to whom the goods were conſigned, and not in the name of the conſignor: For the conſignor parted

with his property upon his delivering the goods to the carrier, and no property remained in him after the delivery. Unto this it was answered, that the queſtion doth not turn upon the ſtrict property. The carrier has nothing to do with the veſting of the property. It does not lie in his mouth to ſay, that the conſignor is not the owner. He is the owner with reſpect to the carrier, who undertook to him, and was to be paid by him.—Lord *Mansfield* ſaid there was neither law nor conſcience in the objection. The veſting of the property may differ according to the circumſtances of caſes: But it does not enter into the preſent queſtion. This is an action upon the agreement between the plaintiff and the carrier. The plaintiff was to pay him. Therefore the action is properly brought by the plaintiff, who agreed with him, and was to pay him. *Bur. Mansf.* 2680.

Goods delivered to the carrier's ſervant.

11. A delivery to the carrier's ſervant, is a delivery to the carrier; and if goods are delivered to a carrier's porter, and loſt, an action will lie againſt the carrier. *Read.* Car.

At Bury aſſizes, 1732, in the caſe of *Harvey* againſt *Syliard* and his wife; the plaintiff brought his action againſt *Syliard* and his wife, for a box with 80l in it, which was delivered to her as book-keeper for her brother, who was a carrier, in order to be ſent by the waggon to London; which 80l was afterwards loſt: It was adjudged, that the action would not lie againſt her, but it ought to have been brought againſt the brother himſelf. And the plaintiff was nonſuited. 2 *Barnard.* 234.

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How far it is neceſſary that the carrier ſhould know what the goods are.

* 12. If a box is delivered generally to a carrier, and he accepts it, he is anſwerable, tho' the party did not tell him there is money in it. But if the carrier aſks, and the other ſays no, or if he accepts it conditionally, provided there is no money in it, in either of theſe caſes the carrier is not liable. *Str.* 145.

If a man delivers a box to a carrier to carry, and he aſks what is in it, and the man tells him, a book and tobacco (as the caſe was) and in truth there is 100l beſides; yet if the carrier is robbed, he ſhall anſwer for the money; for the other was not bound to tell him all the particulars in the box, and it was the buſineſs of the carrier to have made a ſpecial acceptance. 1 *Bac. Abr.* 345.

But if a perſon, being a common carrier, receives by his book-keeper from another man's ſervant, two bags of money ſealed up, containing as was told him 200l, and the book-keeper gives a receipt for his maſter to this effect, Received of ſuch a one two bags of money ſealed up, ſaid to contain 200l, which I promiſe to deliver on ſuch a day at ſuch a place unto ſuch a perſon, he to pay 10s *per cent.* for carriage and riſque; tho' the bags contain 400l, and the carrier is robbed, he ſhall be anſwerable only for 200l, for this is a particular undertaking, and as it is by reaſon of the reward

ward that the carrier is liable, when the plaintiff endeavours to defraud him of it, it is but reaſonable he ſhould be barred of the remedy, which is only founded on the reward. 1 *Bac. Abr.* 346.

A man took a place in a ſtage coach, and in the journey the defendant by negligence loſt the plaintiff's trunk; upon not guilty pleaded, the evidence was, that the plaintiff gave the trunk to the man that drove the coach, who promiſed to take care of it, but loſt it: *Holt* chief juſtice held, that the maſter was not chargeable, and that a ſtage coachman is not within the cuſtom as a carrier is, unleſs the maſter makes a diſtinct price for the carriage of the goods as well as of the perſons. 1 *Salk.* 282.

But by the cuſtom and uſage of ſtage coaches, every paſſenger uſes to pay for the carriage of goods above ſuch a weight; and in ſuch caſe the coachman ſhall be charged for the loſs of goods beyond ſuch weight. *Comyn.* 25.

In the caſe of *Gibbon* and *Paynton*, E. 9 G. 3. An action was brought againſt the *Birmingham* ſtage coachman, for 100l in money, ſent from *Birmingham* to *London* by his coach, and loſt. It was hid in hay, in an old nail-bag. The bag and the hay arrived ſafe; but the * money was gone. The coachman had inſerted an adver- *320
tiſement in a *Birmingham* news paper, with a *nota bene*, that the coachman would not be anſwerable for money or jewels or other valuable goods, unleſs he had notice that it was money or jewels or valuable goods that was delivered to him to be carried. He had alſo diſtributed hand bills of the ſame import. It was notorious in that country, that the price of carrying money from *Birmingham* to *London* was three pence in the pound. The plaintiff was a dealer at *Birmingham*; and had frequently ſent goods from thence. It was proved that he had been uſed, for a year and a half, to read the news paper in which this advertiſement was publiſhed; though it could not be proved that he had ever actually read or ſeen the individual paper wherein it was inſerted. A letter of the plaintiff's was alſo produced, from whence it appeared that he knew the courſe of this trade, and that money was not carried from that place to *London* at the common and ordinary price of the carriage of other goods. And the jury found a verdict for the defendant. On behalf of the plaintiff, it was moved for a new trial; and a rule was obtained to ſhew cauſe. On ſhewing cauſe, the court were of opinion that the verdict was right. By the general cuſtom of the realm, a common carrier inſures the goods, at all events. And it is right and reaſonable that he ſhould do ſo. But he may make a ſpecial contract; or he may refuſe to contract, in extraordinary caſes, but upon extraordinary terms. And certainly, the party undertaking ought to be apprized what it is that he undertakes: and then he will, or at leaſt may, take proper care. But he ought not to be anſwerable where he is deceived. Here he was deceived: The money was hid in an old nail-bag; and it was concealed from him, that it was money. The true principle of a carrier's being anſwerable, is the reward. And a higher price ought in conſcience to be paid

paid him for the inſurance of money and other valuable things, than for inſuring common goods of ſmall value.—And the rule was diſcharged. *Burrow. Manſf.* 2298.

Carrier may indict for goods ſtolen, as his own property.

13. Where goods are ſtolen from the carrier, he may prefer an indictment againſt the felon, as for his own goods; for tho' he has not the abſolute property, yet he has ſuch a poſſeſſory property, that he may maintain an action of treſpaſs againſt any one who takes them from him, and ſo may indict a thief for taking them; and the indictment were good alſo, if it had been brought by the real owner. *Kelynge.* 39.

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Perſon ſtealing his own goods from the carrier.

* 14. And there is a ſpecial caſe, wherein it is ſaid, that a man may commit larceny by ſtealing his own goods delivered to the carrier, with intent to make him anſwer for them; for the carrier had a ſpecial kind of property in the goods, in reſpect whereof, if a ſtranger had ſtolen them, he might have been indicted generally as having ſtolen the ſaid carrier's goods, and the injury is altogether as great, and the fraud as baſe, where they are taken away by the very owner. 1 *Haw.* 94.

Carrier may retain goods for his hire.

15. E. 1 An. *Skinner* and *Upſhaw.* The plaintiff brought an action of trover againſt the defendant who was a common carrier, for goods delivered to him to carry. On not guilty pleaded, the defendant gave in evidence, that he offered to deliver the goods to the plaintiff, if he would pay him his hire; but that the plaintiff refuſed, and therefore he retained them. And it was ruled by *Holt* chief juſtice at *Guildhall* (before whom the cauſe was tried) that a carrier may retain the goods for his hire. And on direction, the defendant had a verdict given for him. L. *Raym.* 752.

And even if the goods be ſtolen goods, yet the right owner ſhall not have them without paying for the carriage. For the carrier being obliged to receive and carry the goods, the law will not deprive him of the remedy for the reward due for the carriage. *Ibid.* 166.

CARROTS.

The penalty for ſtealing *carrots* is the ſame as that for ſtealing *turnips*, *potatoes*, *cabbages*, *parſnips*, and *peaſe:* which are treated of together under the title *Turnips.*

Carts. See *Waggons.*

Caſual death. See *Deodand.*

I. Concerning the bringing of cattle into England.
II. Buying and ſelling of cattle.
III. Stealing, killing, or maiming of cattle.
IV. Prohibiting the importation of hides, ſkins, or other parts of cattle, to prevent infection.

I. Concerning the bringing of cattle into England.

1. BY the 5 G. 3. c. 43. Beſtials may be freely imported from the iſle of *Man*. *Cattle of the iſle of Man.*

2. By the ſixth article of the union, no *Scotch* cattle carried into *England*, ſhall be liable to any other duties, than thoſe to which cattle of *England* are liable. 5 An. c. 8. *Scotch cattle.*

3. By the 5 G. 3. c. 10. which was of temporary continuance, but by the 16 G. 3. c. 8. made perpetual, all ſorts of cattle may be imported from *Ireland* duty free. *Iriſh cattle.*

II. Buying and ſelling of cattle.

No perſon ſhall buy any ox, ſteer, ront, cow, heifer, or calf, and ſell the ſame again alive in the ſame market or fair; on pain of forfeiting double value, half to the king, and half to him who ſhall ſue. 3 & 4 Ed. 6. c. 19. 3 C. c. 4. ſ. 7. 8. And the ſaid act of 3 & 4 Ed. 6. c. 19. is not repealed by the 12 G. 3. c. 71. which repeals the general foreſtalling, ingroſſing, and regrating act of 5 & 6 Ed. 6. c. 14. and other ſubſequent acts inforcing the ſame; but hath no reference to any preceding act. *None ſhall buy and ſell in the ſame market.*

III. Stealing, killing, or maiming of cattle.

1. By the 22 & 23 C. 2. c. 7. If any perſon ſhall in the night time maliciouſly, unlawfully, and willingly *kill or deſtroy* any horſes, ſheep, or other cattle, he ſhall be guilty of felony; but *Killing or wounding in the night.*

without

without corruption of blood, or loſs of dower: But to avoid judgment of death, or execution thereupon, he may chuſe to be tranſported to ſome of the plantations, to be mentioned in the judgment, for ſeven years.

And if any perſon ſhall in the night time maliciouſly, unlawfully, and willingly *maim, wound, or otherwiſe hurt* * any horſes, ſheep, or other cattle, whereby the ſame ſhall not be killed or utterly deſtroyed; he ſhall forfeit treble damages, by action of treſpaſs, or upon the caſe: *323

And three juſtices (1 Q.) may inquire by a jury and witneſſes; and may iſſue warrants for ſummoning jurors, and for apprehending perſons ſuſpected, and take their examinations; and cauſe witneſſes to come before them to give information on oath, ſo as no perſon to be examined ſhall be proceeded againſt, for any offence concerning which he is examined as a witneſs, and ſhall make a true diſcovery: and if ſuch witneſs, being ſummoned, refuſe to appear, they may commit him till he ſubmit to be examined on oath.

Stealing or killing with intent to ſteal; 10l. reward.

2. And by the 14 G. 2. c. 6. and 15 G. 2. c. 34. If any perſon ſhall feloniouſly drive away, or in any other manner felonioufly ſteal any ox, bull, cow, calf, ſteer, bullock, heifer, ſheep, or lamb; or ſhall wilfully kill any ox, bull, cow, calf, ſteer, bullock, heifer, ſheep, or lamb, with a felonious intent to ſteal the whole carcaſs, or any part thereof; or ſhall aſſiſt or aid in committing any ſuch offence, he ſhall be guilty of felony without benefit of clergy.

And every perſon who ſhall apprehend and proſecute to conviction any offender ſhall have 10l. reward. In order to which he ſhall have a certificate ſigned by the judge, before the end of the aſſizes, certifying the conviction, and where the offence was committed, and that ſuch offender was apprehended and proſecuted by the perſon claiming the reward; and if there are ſeveral claimants, the judge ſhall in the ſaid certificate direct what ſhare ſhall be paid to each claimant. Which certificate being tendered to the ſheriff, he ſhall within a month pay the ſame without deduction; on pain of forfeiting double, with treble coſts. The ſame to be allowed in his accounts, or to be paid to him out of the treaſury.

Killing or wounding by the Black act.

3. And by the 9 G. c. 22. commonly called the Black Act, which is inſerted at large under the title of that name, If any perſon ſhall unlawfully and maliciouſly kill, maim, or wound any cattle, he ſhall be guilty of felony without benefit of clergy; but without corruption of blood.

And the hundred ſhall be anſwerable for the damages, not exceeding 200l.

And if any perſon ſhall apprehend, or cauſe to be convicted, any offender, and ſhall be killed, or wounded, ſo as to loſe an eye or the uſe of any limb, in endeavouring to apprehend or ſecure him; on proof thereof at the ſeſſions, and on certificate thereof from thence,

thence, the ſheriff ſhall * within thirty days pay to the perſon inti- *324
tled the ſum of 50l, to be repaid to him out of the treaſury.

IV. Prohibiting the importation of hides, ſkins, or other parts of cattle, to prevent infection.

It ſhall be lawful for the king, his heirs or ſucceſſors, as often as he or they ſhall find it neceſſary, by proclamation with the advice of his privy council, or by his order in council, to be publiſhed in the *London Gazette*, to prohibit generally, or from any particular country or countries, the importation of any hides or ſkins, horns or hoofs, or any other part of any cattle or beaſt, into *Great Britain* or *Ireland*, for ſuch time, and under ſuch rules, orders and regulations, as he or they by the advice aforeſaid ſhall judge moſt expedient and effectual to prevent any contagious diſtemper from being brought into theſe kingdoms. 9 G. 3. c. 39.

CERTIORARI.

Certiorari, what.

A Certiorari is an original writ, iſſuing out of the court of chancery, or the king's bench, directed in the king's name to the judges or officers of inferior courts, commanding them to *certify* or to return the records of a cauſe depending before them, to the end the party may have the more ſure and ſpeedy juſtice, before the king or ſuch juſtices as he ſhall aſſign to determine the cauſe. 1 *Bac. Abr.* Certior. A.

What things may be certified without a writ of certiorari.

Alſo, the juſtices of the peace may deliver or ſend into the king's bench, indictments found before them, or recognizances of the peace taken before them, or force recorded by them, without any certiorari. *Dalt.* c. 195.

Concerning which writ of certiorari, it is here ſhewn.

I. In what caſes it is grantable.
II. How to be granted and allowed.
III. The effect of it.
IV. The return of it.

CERTIORARI.

I. *In what cases it is grantable.*

In cases where a writ of error lies not.

1. A certiorari lies in all judicial proceedings, in which a writ of error does not lie; and it is a conſequence of all * inferior juriſdictions erected by act of parliament to have their proceedings returnable in the king's bench. L. *Raym.* 469, 580.

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Where not ſpecially prohibited by ſtatute.

2. And therefore a certiorari lies to juſtices of the peace, even in ſuch caſes which they are empowered by ſtatute finally to hear and determine; and the ſuperintendency of the court of king's bench is not taken away without expreſs words. 2 *Haw.* 286.

After conviction.

3. But it ſeems agreed, that a certiorari ſhall never be granted to remove an indictment after a conviction, unleſs for ſome ſpecial cauſe; as where the judge below is doubtful what judgment to give. 2 *Haw.* 288.

And, E. 18 G. 2. *K.* and *Nicholls.* An indictment was removed into the court of king's bench by certiorari, after conviction, and before judgment. Upon which a doubt aroſe, what the court could do, the certiorari being brought before judgment; and this court not being apprized of the circumſtances of the offence, could not tell what judgment to give: And in *Carth.* 6. it is ſaid, they cannot give judgment. A rule therefore was made to ſhew cauſe why the certiorari ſhould not be quaſhed, ſo as to remit it back to the ſeſſions; which was afterwards made abſolute. *Str.* 1227.

And in the caſe of the *King* againſt *Gwynne* and others, *H.* 32 G. 2. The court (on a defended motion) granted a *Procedendo*, at the inſtance of the defendants, upon an indictment for an aſſault at the quarter ſeſſions at *Brecon*, removed into the king's bench by certiorari; becauſe the certiorari had not iſſued till after the defendants had confeſſed the aſſault below; though the conviction was not after a trial, and though ſeveral of the juſtices were ſworn to be near relations of Mr. *Gwynne* one of the defendants, namely, his father, two brothers, and an uncle. *Burrow.* Mansfield. 749.

After iſſue joined.

4. Alſo, it ſeems a good objection againſt the granting a certiorari, that iſſue is joined in the court below, and a *venire* awarded for the trial of it. 2 *Haw.* 288.

Where the court is bound of right to grant it.

5. It hath been adjudged, that wherever a certiorari is by law grantable for an indictment, the court is bound of right to award it at the inſtance of the proſecutor, becauſe every indictment is the ſuit of the king, and he has a prerogative of ſuing in

in what court he pleaſes. But it ſeems to be agreed that it is left to the diſcretion of the court, either to grant or deny it at the prayer of the defendant. 2 *Haw.* 287. *Burr. Manſf.* 2456.

M. 28 G. 3. *K.* v. *Eaton.* *Baldwin* moved for a *certiorari* to remove a conviction by a juſtice on the 16 G. 3. c. 30. * to prevent *326 the ſtealing of deer. *Erſkine* objected, firſt, that no *certiorari* lay; for by the 23d ſection it is enacted, that no conviction or judgment ſhould be removed by *certiorari*.—But the *court* were of opinion, that the reſult of the ſeveral proviſions in the act was, that the defendant had an option, either to remove the proceedings from before the juſtice convicting by *certiorari*, or to appeal to the ſeſſions; that if he had adopted the latter mode, the *certiorari* would have been barred, but not in the former caſe.—*Erſkine* then objected that the defendant ought to lay a ground by affidavit before the court granted a *certiorari*, as that the juſtice convicted had exceeded his juriſdiction, or had not examined the defendant's witneſſes, or the like; for if every defendant were at liberty to remove a conviction *of courſe*, this great inconvenience would reſult from it, that every conviction before a juſtice would be removed by *certiorari* into this court merely to delay the ſentence, and the magiſtrate who had only done his duty, would be put to great vexation and expence; and he cited *K.* v. *Abbott.* *Dougl.* 534.—*Baldwin* in anſwer ſaid, that the practice of the court had always been to grant a *certiorari* of courſe upon the application of either party.—*Buller* J. The language of the court has always been, that the king has a right to remove proceedings by *certiorari* of courſe; but that where a defendant makes an application of this ſort, he muſt always lay a ground for it before the court. Lord *Mansfield* has laid down this diſtinction again and again, that on the part of the crown it is a matter of courſe for the court to grant it, but not ſo on the part of the defendant. Now if it be not a matter *of courſe* to grant ſuch an application as this, it can only be obtained by laying a ground by affidavit: a ſlight ground indeed may be ſufficient, but there muſt be ſome, or elſe what is the conſequence? we ſhould have to decide upon every conviction in the kingdom, which would be removed into this court. The two other judges concurred. *Caſ.* by *Durnf.* and *Eaſt.* v. 2. 89.

6. And it ſeems that the court will not ordinarily, at the prayer of the defendant, grant a certiorari for the removal of an indictment of perjury, or forgery, or other heinous miſdemeanor; for ſuch crimes deſerve all poſſible diſcountenance, and the certiorari might delay, if not wholly diſcourage the proſecution. 2 *Haw.* 287. *Not for heinous crimes.*

But in extraordinary circumſtances the court will ſometimes diſpenſe with this rule. As in the caſe of *K.* & *Fawle*, M. 13 G. The court granted a certiorari to remove an indictment for felony found at the quarter-ſeſſions, upon * affidavits that the defendant could *327 not have a fair trial there. L. *Raym.* 1452.

II. How to be granted and allowed.

How to be granted on indictment or preſentment.

1. On *indictment or preſentment:* By the 5 W. c. 11. and 8 & 9 W. c. 33. it is enacted, that "in "term time, no writ of *certiorari*, at the proſe- "cution of any party indicted, ſhall be granted "out of the king's bench, to remove any in- "dictment or preſentment of treſpaſs or miſdemeanor, before trial "had, from before the juſtices in ſeſſions; unleſs ſuch *certiorari* "ſhall be awarded upon motion of counſel, and by rule of court "made for the granting thereof.

"But in the vacation, writs of *certiorari* may be granted by any "juſtice of the king's bench; whoſe name ſhall be indorſed on the "writ, and alſo the name of the perſon at whoſe inſtance it is "granted.

"And all the parties indicted, proſecuting ſuch *certiorari* ſhall, "before the allowance thereof, find two ſufficient manucaptors, "who ſhall enter into a recognizance before a juſtice of the "king's bench (who ſhall indorſe the ſame on the writ), or be- "fore a juſtice of the peace of the county or place, in the ſum of "20l, with condition, at the return of the writ, to appear and "plead to the ſaid indictment or preſentment, in the ſaid court of "king's bench, and at his own coſts and charges to cauſe and pro- "cure the iſſue that ſhall be joined thereupon, or any plea relat- "ing thereunto, to be tried at the next aſſizes for the county "wherein the indictment or preſentment was found, after ſuch "*certiorari* ſhall be returned, or the next term if in *London*, *Weſt- "minſter*, or *Middleſex*, unleſs the court ſhall appoint another "time, and if ſo, then at ſuch other time; and to give due notice "of ſuch trial, to the proſecutor or his clerk in court; and alſo "that the party proſecuting the writ of *certiorari*, ſhall appear "from day to day, in the ſaid court of king's bench, and not de- "part until he ſhall be diſcharged by the court.

"And the ſaid recognizance ſhall be certified into the king's "bench, with the *certiorari* and indictment, to be there filed, "and the name of the proſecutor (if he ſhall be the party grieved), "or ſome publick officer, ſhall be indorſed on the indictment.

"And if the defendant proſecuting the writ of *certiorari*, be "convicted of the offence for which he was indicted, then the "court of king's bench ſhall give reaſonable coſts to the proſecu- "tor, if he be the party grieved or injured, or be a juſtice, con- "ſtable, or other civil officer, who proſecutes on account of any "thing that concerned him as officer, to be taxed according to "the courſe of the ſaid court, who ſhall, for the recovery thereof,

"within

" * within ten days after demand, and refusal of payment, on *328
" oath, have an attachment awarded; and the recognizance not
" to be discharged till the costs are paid.

" But if the person procuring the *certiorari*, being the defend-
" ant, shall not, before allowance thereof, procure such manuc-
" tors to be bound as aforesaid, the justices may proceed to the
" trial of the indictment in sessions, notwithstanding the writ of
" *certiorari* delivered."

At the prosecution of any party indicted] This extends only to certiorari's procured by persons indicted; from whence it follows, that those which are procured by the prosecutor of an indictment, remain as they were at common law. 2 *Haw.* 292.

To be tried at the next assizes] But the recognizance shall not be forfeited, unless the prosecutor give rules according to the course of the court. 2 *Haw.* 293.

Reasonable costs] The master of the crown office, in taxing the costs, ought only to consider those which are subsequent to the certiorari. 2 *Haw.* 292.

To the prosecutor, if he be the party grieved or injured] M. 20 G. 2. *K.* and *Ingleton.* The defendant was indicted for attempting to set fire to the house of one *Eston* in *York*, and the indictment also charged that the defendant solicited *Mason*, one of the prosecutors, to help to set fire to the house. *Mason* and one *Glenton* informed the mayor of *York* of this, who bound *Mason* and *Glenton* over to prosecute the defendant. The said defendant removed the indictment by certiorari into the court of king's bench, and was thereupon convicted and fined. On payment of the fine, it was moved that the recognizance should be discharged. Unto which it was objected, that the defendant was obliged, before the discharge thereof, to pay the costs of the prosecutors. But by the court, this case is not within the act, for the act extends only to officers and persons really injured, which neither *Glenton* nor *Mason* are, for there was no damage done to the house, but only intended to be done, nor are either of them officers. And the recognizance was discharged. 1 *Wilson.* 139.

In a like case, M. 30 G. 2. *K.* and *Smith.* It was moved, that before the recognizance should be discharged, the prosecutor should have his costs. The objection was that no name of any person, as being either the party grieved or injured, or a public civil officer, was indorsed upon the indictment. It was answered, That this is not * necessary in order to giving costs; that to this purpose it is *329
sufficient, if the prosecutor actually be a civil officer, and of that in the present case there was an affidavit: and the act does not say, that the prosecutor shall not have his costs, unless his name be indorsed. By the court; it is enough, if it be proved that the prosecutor was such officer, and here it is proved by affidavit. And it was ruled, that the prosecutor should have his costs, before the recognizance should be discharged. *Burrow. Mansf.* 54.

May proceed to the trial] Nevertheleſs they muſt make a return to the certiorari, otherwiſe they will be in contempt to the court; for all writs muſt be obeyed, unleſs good cauſe be ſhewn to the contrary; and the proper way of ſhewing it, is to return it. 2 *Haw.* 292.

How to be granted on an order or conviction.

2. On a *conviction or order:* By the 13 G. 2. c. 18. it is enacted, that "no *certiorari* ſhall be "granted, to remove any conviction, judgment, "order, or other proceedings, before any juſtice "of the peace, or the general or quarter ſeſſions, "unleſs it be applied for in ſix calendar months "after ſuch proceedings had or made, and unleſs it be duly "proved upon oath, that the party ſuing forth the ſame, hath "given ſix days notice thereof in writing, to the juſtice or juſtices, "or two of them (if ſo many there be), before whom ſuch pro-"ceedings have been, to the end that ſuch juſtices, or the parties "therein concerned, may ſhew cauſe if they ſo think fit, againſt "iſſuing the *certiorari*."

And by 5 G. 2. c. 19. "No ſuch *certiorari* ſhall be allowed, "to remove any ſuch judgment or order, unleſs the party proſe-"cuting the *certiorari*, before the allowance thereof, enter into a "recognizance, with ſufficient ſureties, before a juſtice of the "county or place, or before the juſtices at ſeſſions where ſuch "judgment or order ſhall have been given or made, or before a "juſtice of the king's bench, in 50l, with condition to proſecute "the ſame at his own coſts and charges with effect, without wil-"ful delay, and to pay the party in whoſe favour the judgment or "order was made, within a month after the ſame ſhall be con-"firmed, his full coſts to be taxed according to the courſe of the "court where ſuch confirmation ſhall be. And if he ſhall not en-"ter into ſuch recognizance, or ſhall not perform the conditions, "the juſtices may proceed and make ſuch further order for the be-"nefit of the party for whom the judgment ſhall be given, in ſuch "manner as if no *certiorari* had been granted.

"The ſaid recognizance to be certified into the king's bench, "and there filed, with the *certiorari* and order or judgment re-"moved thereby.

*330 * "And if the order or judgment ſhall be confirmed by the "court, the perſon intitled to the coſts, for the recovery thereof, "within ten days after demand made, upon oath of ſuch demand "and refuſal of payment, ſhall have an attachment granted for "the contempt; and the recognizance not to be diſcharged till the "coſts are paid and the order complied with."

E. 1 An. A rule was made in the court of king's bench, that no certiorari ſhould be granted to remove orders of juſtices, from which the law has given an appeal to the ſeſſions, before the matter be determined on the appeal, becauſe it hinders the privilege of appealing; and that if any order be removed before appeal, it ſhould be ſent down again: but if the time of appeal be expired, that

that caſe is not within the rule: by *Holt* Ch. J.—But afterwards M. 4 An. in the caſe of *Shellington*, it was held, that advantage muſt be taken of this rule upon the motion to file the order; for that after it is filed it is too late. 1 *Salk.* 147.

But in the caſe of the borough of *Warwick*, M. 8 G. 2. There was an appeal from a poor rate; and the ſeſſions made an order that the churchwardens ſhould produce the books at an adjourned day; before which, a certiorari was brought to remove that order: And it was held to lie, though the appeal was depending; elſe the order muſt be obeyed before the validity of it can be determined. It was alſo held that an appointment of overſeers may be removed before an appeal to the ſeſſions; for the rule laid down in 1 *Salk.* 147. extends only to the caſe where there is a limited time for appealing, as to the *next* quarter ſeſſions; but the ſtatute of the 43 El. c. 2. is not ſo reſtrained: and conſequently it can never be ſaid, that the time for appealing is out. And if the appeal from an appointment is lodged, there can be no certiorari, till the ſeſſions hath made a determination; and a certiorari brought, pending ſuch appeal, ſhall be ſuperſeded. *Str.* 991.

III. The effect of it.

1. After a certiorari is allowed by the inferior court, it makes all the ſubſequent proceedings on the record that is removed by it erroneous. 2 *Haw.* 293.

Subſequent proceedings void.

2. But it hath been adjudged, that if a certiorari for the removal of an indictment before juſtices of the peace be not delivered, before the jury be ſworn for the trial of it, the juſtices may proceed. 2 *Haw.* 294.

Except where the jury is ſworn.

3. And the juſtices may ſet a fine to compleat their judgment, after a certiorari delivered. L. *Raym.* 1515.

And after judgment.

* 4. A certiorari removes all things done between the teſte and return. L. *Raym.* 835, 1305.

Removes all after the teſte of it.

*331

5. A certiorari removes the record itſelf out of the inferior court: and therefore if it remove the record againſt a principal, the acceſſary cannot there be tried. 2 *Haw.* 325.

Removes the record itſelf.

6. And if the defendant be convicted of a capital offence, the perſon of the defendant muſt be removed by habeas corpus, in order to be preſent in court, if he will move in arreſt of judgment. And herein the caſe of a conviction differs from that of

In what caſe the perſon of the defendant ſhall be removed.

a ſpecial

a ſpecial verdict; where the preſumption of innocence may be ſuppoſed to continue, and therefore the perſonal preſence of the defendant in that caſe is not neceſſary at the argument of it. *Burrow.* Mansfield. 930. K. and Spragg. H. 33 G. 2.

How far it ſuperſedes the obligation of a recognizance.

7. It hath been holden, that a certiorari for the removal of a recognizance for the good behaviour, or an appearance at ſeſſions, will ſuperſede the obligation of it: but this would be highly inconvenient, and the contrary ſeems to be ſupported by the better authority. 2 *Haw.* 292.

Caſe where it is awarded againſt law.

8. If a *ſuperſedeas* come out of a ſuperior court, to the juſtices, they ought to ſurceaſe, altho' the *ſuperſedeas* be awarded againſt law; for they are not to diſpute the command of a ſuperior court, which is a warrant to them. *Crom.* 129.

IV. The return of it.

Return of the certiorari.

1. Every return of a *certiorari* ought to be under ſeal. 2 *Haw.* 294.

2. And altho' the *cuſtos rotulorum* keep the records, yet muſt the juſtices, to whom it is directed, return the certiorari; and therefore if it is directed to the juſtices of the peace, and the clerk of the peace only return it, nothing is thereby removed. 2 *Haw.* 294.

3. The certiorari may be ſometimes to remove and ſend up the record itſelf, and ſometimes but only the tenor of the record (as the words therein be), and it muſt be obeyed accordingly. *Dalt.* c. 195. 2 *Haw.* 295.

4. A return was in paper, (and not upon parchment); and for that reaſon was held by the court not good. 1 *Barnardiſt.* 113. H. 2 G. 2. K. and the inhabitants of Darlington.

5. Upon a certiorari to remove an indictment of a riot, or forcible entry, or the like, the return muſt have theſe words, *as alſo to hear and determine divers felonies*, &c. according to the commiſſion; for if the return mentions only * that they are juſtices of the peace, without ſuch words, the return is inſufficient. *Dalt.* c. 195.

* 332

6. If the perſon to whom a certiorari is directed, do make a falſe return, yet the court will not ſtay filing it on affidavit of its being falſe, except in public caſes, as in caſes of commiſſioners of ſewers, or for not repairing highways, or for ſome ſuch ſpecial cauſes; becauſe the remedy for a falſe return is either an action on the caſe at the ſuit of the party grieved, or an information at the ſuit of the king. *Dalt.* c. 195.

7. If

7. If the perſon to whom the certiorari is directed, do not make a return, then an *alias*, that is, a ſecond writ; then a *pluries*, that is, a third writ, or *cauſam nobis ſignifices*, ſhall be awarded, and then an attachment. *Crom.* 116.

Beſides theſe general rules, in common to all certiorari's, there are many times ſpecial directions about granting and allowing or not allowing them, in particular caſes, which are treated of under their reſpective titles; ſuch as highways, game, tithes, ſwearing, and many others.

The return of a certiorari may be thus:

Firſt, on the backſide of the writ indorſe theſe or the like words:

The execution of this writ appears in a ſchedule to the ſame writ annexed.

And that ſchedule may be thus, on a piece of parchment by itſelf, and filed to the writ:

Weſtmorland. I *Sir* Philip Muſgrave, *baronet, one of the keepers of the peace and juſtices of our lord the king, aſſigned to keep the peace within the ſaid county, and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in the ſame county committed, by virtue of this writ to me delivered, do under my ſeal certify unto his majeſty in his court of king's bench, the indictment of which mention is made in the ſame writ, together with all matters touching the ſame indictment. In witneſs whereof I the ſaid Sir* P. M. *have to theſe preſents ſet my ſeal. Given at* ——— *in the ſaid county, the* ——— *day of* ——— *in the* ——— *year of the reign of* ———.

Then take the record of the indictment, and cloſe it within the ſchedule, and ſeal and ſend them up both together with the certiorari.

* Challenge. See *Jurors.* *333
Champerty. See *Maintenance.*
Chance medley. See *Homicide.*

CHEAT.

OF cheats puniſhable by publick proſecution, there are two kinds,

I. By the common law.
II. By ſtatute.

I. By the common law.

1. Cheats which are puniſhable by the common law, may in general be deſcribed to be deceitful practices, in defrauding or endeavouring to defraud another of his known right, by means of ſome artful device, contrary to the plain rules of common honeſty; as by playing with falſe dice; or by cauſing an illiterate perſon to execute a deed to his prejudice, by reading it over to him in words different from thoſe in which it was written; or by perſuading a woman to execute writings to another, as her truſtee, upon an intended marriage, which in truth contained no ſuch thing, but only a warrant of attorney to confeſs a judgment; or by ſuppreſſing a will, and ſuch like. 1 *Haw.* 188.

2. It ſeemeth to be the better opinion, that the deceitful receiving of money from one man, to another's uſe, upon a falſe pretence of having a meſſage and order to that purpoſe, is not puniſhable by a criminal proſecution, becauſe it is accompanied with no manner of artful contrivance, but wholly depends on a bare naked lie; and it is ſaid to be needleſs to provide ſevere laws for ſuch miſchiefs, againſt which common prudence and caution may be a ſufficient ſecurity. 1 *Haw.* 188.

3. A perſon for a counterfeit paſs, was adjudged to the pillory, and fined. *Dalt. c.* 32.

4. On an indictment againſt the defendant, a miller, for changing corn delivered to him to be ground, and giving bad corn inſtead of it, it was moved to quaſh the ſame, becauſe it is only a private cheat, and not of a publick nature. It was anſwered,
* 334 that being a cheat in the * way of trade, it concerned the publick, and therefore was indictable. And the court unanimouſly agreed not to quaſh it. T. 16 G. 2. *K.* and *Wood.* 1 Seſſ. C. 217.

5. A perſon falſely pretending that he had power to diſcharge ſoldiers, took money of a ſoldier to diſcharge him; and being indicted for the ſame, the court held the indictment to be good. T. 3 C. *Serleſtead's* caſe. 1 *Latch.* 202.

6. As there are frauds which may be relieved civilly, and not puniſhed criminally (with the complaints whereof the courts of equity do generally abound); ſo there are other frauds, which in a

ſpecial

ſpecial caſe may not be helped civilly, and yet ſhall be puniſhed criminally: Thus if a minor goes about the town, and pretending to be of age, defrauds many perſons by taking credit for conſiderable quantities of goods, and then inſiſts on his non-age; the perſons injured cannot recover the value of their goods, but they may indict and puniſh him for a common cheat. *Barl.* 100.

7. Finally, the diſtinction which, as it ſeemeth, will ſolve almoſt all caſes of this kind, was taken in the caſe of *K.* and *Wheatly*, H. 1 G. 3. The defendant was indicted and convicted for ſelling beer ſhort of the due and juſt meaſure, to wit, 16 gallons as and for 18. It was moved in arreſt of judgment. And by the court, This is only an inconvenience and injury to a private perſon, ariſing from that private perſon's own negligence and careleſſneſs in not meaſuring the liquor, upon receiving it, to ſee whether it held out the juſt meaſure or not. Offences that are indictable muſt be ſuch as affect the publick. As if a man uſes falſe weights and meaſures, and ſells by them to all or to many of his cuſtomers, or uſes them in the general courſe of his dealing; ſo if there is a conſpiracy to cheat: For theſe are deceptions that common care and prudence are not ſufficient to guard againſt. Theſe are much more than private injuries; they are publick offences. But in the preſent caſe, it is a mere private impoſition or deception. No falſe weights or meaſures are uſed; no conſpiracy: Only an impoſition upon the perſon he was dealing with, in delivering him a leſs quantity inſtead of a greater; which the other careleſsly accepted. It is only a non-performance of his contract; for which non-performance he may bring his action. So, the ſelling an unſound horſe for a ſound one, is not indictable: The buyer ſhould be more upon his guard. And the diſtinction which was laid down, as proper to be attended to in all caſes of this kind, is this: That in ſuch impoſitions or deceits * where common prudence may guard perſons againſt their ſuffering from them, the offence is not indictable, but the party is left to his civil remedy for the redreſs of the injury that has been done to him; but where falſe weights and meaſures are uſed, or falſe tokens produced, or ſuch method taken to cheat and deceive, as people cannot by any ordinary care or prudence be guarded againſt, there it is an offence indictable. *Burrow.* Mansfield. 1125. *Blackſt. Rep.* 273. *335

II. By ſtatute.

1. By the 33 H. 8. c. 1. If any perſon ſhall falſely and deceitfully obtain, or *get into his hands or poſſeſſion* any money, goods, chattels, jewels, or other things, of any other perſon, by colour and means of any *falſe privy token*, or counterfeit letter made in another man's name; and ſhall be convicted thereof, by examination of witneſſes, or confeſſion, at the aſſizes or ſeſſions, or by ac-

tion in any court of record; he ſhall have ſuch puniſhment by impriſonment, pillory, or other *corporal pain* (except death), as the court ſhall appoint. Saving to the party grieved ſuch remedy by action or otherwiſe, for the goods ſo obtained, as he might have had by the common law.

And two juſtices (1 Q.) may call and convent by proceſs or otherwiſe (A), to the aſſizes or ſeſſions, any perſon ſuſpected, and commit *or bail him* to the next aſſizes or ſeſſions.

Get into his hands or poſſeſſion] A perſon endeavouring by a counterfeit letter to defraud another of goods, and being apprehended on ſuſpicion of ſuch fraud, before he hath got the goods into his poſſeſſion, ſeems not to be within this ſtatute. E. 3 G. 2. *K.* and *Brian.* Seſſ. C. V. 2. 27.

Falſe privy token] On motion to quaſh an indictment, which was, that the defendant came pretending that ſuch a perſon had ſent him to receive 20l, and received it, whereas ſuch perſon did not ſend him; By the court, It is not indictable, unleſs he came with *falſe tokens*; for we are not to indict one man for making a fool of another. *Blackerby.* 79.

H. 13 G. 2. *K.* and *Munoz.* It was adjudged, that an indictment averring the offence to be by falſe tokens, without ſhewing what thoſe falſe tokens are, is not ſufficient; and that the fraudulently procuring a note from a perſon, by falſely affirming that there was one in the next room that would pay the money due upon it, whereas in fact there was no ſuch perſon in the next room, is not a
*336 *falſe* * *token*, but a falſe affirmation only. 1 *Seſſ.* C. 201. *Str.* 1127.

Note; the ſtatute ſays a falſe *privy* token.

Corporal pain] Lord *Coke* obſerves hereupon, that for this offence the offender cannot be fined, but corporal pain only inflicted. 3 *Inſt.* 133.

But Mr. *Hawkins* obſerves, that there is a precedent in *Cro. Car.* 564. by which it appears, that one convicted on ſuch a proſecution hath been adjudged not only to ſtand on the pillory, but alſo to pay a fine of 500l, and to be bound with good ſureties to the good behaviour. 1 *Haw.* 188.

Commit or bail him] In this caſe the juſtices ſhall do well to take examination of the offence, and to certify the ſame to the ſeſſions or gaol delivery, and withal to bind over the informers and witneſſes to give evidence therein. *Dalt.* c. 32.

2. By the 30 G. 2. c. 24. All perſons who knowingly and deſignedly, by falſe pretence or pretences, ſhall obtain from any perſon, money, goods, wares, or merchandizes, with intent to cheat or defraud any perſon of the ſame, ſhall be deemed offenders againſt law and the publick peace; and the court before whom any ſuch offender ſhall be tried, ſhall on conviction order him to be fined and impriſoned, or to be put in the pillory, or publickly whipped, or

to

to be tranſported as ſoon as conveniently may be for ſeven years. ſ. 1.

And any juſtice, before whom any perſon charged on oath with having committed any of the offences aforeſaid, ſhall examine by oath and ſuch other lawful means as to him ſhall ſeem meet touching the matters complained of, and deal with the offender according to law: and if the party charged as being the offender ſhall be committed to priſon, or admitted to bail, to anſwer the matters complained of at the next ſeſſions or aſſizes; the ſaid juſtices ſhall bind over the proſecutor to appear and proſecute ſuch offender with effect; and if ſuch goods ſo fraudulently obtained appear to ſuch juſtice to exceed the value of 20l, the recognizance ſhall be in not leſs than double the value of the goods. ſ. 2.

*A. Warrant of two juſtices to apprehend an offender; on 33 *H.* 8. *c.* 1. *337

Weſtmorland. { To the conſtable of ———

WHEREAS *complaint hath been made unto us whoſe names and ſeals are hereunto ſet, two of his majeſty's juſtices of the peace for the ſaid county, and one of us of the* quorum, *upon the oaths of* A. I. *of* ——— *yeoman, and* B. I. *of* ——— *yeoman, that on the* ——— *day of* ——— A. O. *of* ——— *yeoman, did by a falſe privy token* [*or counterfeit letter*] *that is to ſay, by* [here particularize the offence] *falſely and deceitfully obtain and get into his hands and poſſeſſion* [here mention the things] *from* C. I. *of* ——— *contrary to the ſtatute in that caſe made: Theſe are therefore to command you, upon ſight hereof, forthwith to bring the ſaid* A. O. *before us at* ——— *on the* ——— *day of* ——— *to anſwer to the ſaid complaint, and further to be dealt withal according to law. Given under our hands and ſeals the* ——— *day of* ———.

Cheeſe. See *Butter.*

Chocolate. See *Exciſe.*

CHURCH AND CHURCH YARD.

Original of the word church.

1. THE ancient Saxon word is *cyrce*, the Daniſh *kircke*, the Belgick *kercke*, the Cimbriek *kirkia* or *kurk*; probably from the Greek word κυριακὸς, belonging to the Lord, or κυρίε οἶκος, the Lord's houſe: ſo that we have loſt the ancient pronunciation of the word (except in the northern parts of *England* and in *Scotland*) by ſoftening the letters *c* or *ch*, as we have done in many caſes; which letters the ancient *Greeks* and *Romans* always pronounced hard, as the letter *k*.

Uniting of churches.

2. "In cities and towns corporate, the biſhop "(with the conſent of the mayor, aldermen, and "juſtices of the peace, and of the patron) may "unite two churches or chapels; and make order with the like "conſent, that the patrons preſent by turns, having regard to "the value of the livings united: and the incumbents thereof "ſhall be graduates." 17 Car. 2. c. 3.

New churches.

3. Clauſes are commonly inſerted in the ſeveral acts of parliament for making proviſion for
*338 the rectors of new churches, * which clauſes give certain powers to juſtices of the peace, in relation to the aſſeſſments to be made for that purpoſe. And in the caſe of borrowing money for rebuilding clergymens houſes, by the 17 Geo. 3. c. 53. the eſtimates are to be ſworn to before a juſtice of the peace or maſter in chancery.

Markets in the church yard.

4. "No fairs nor markets ſhall be kept in "church yards. 13 Ed. 1. ſt. 2. c. 6.

Arreſt in the church or church yard.

5. "Clergymen ſhall not be arreſted, and drawn "out of any church or church yard, whilſt they attend to divine ſervice; on pain of impriſonment "of the offender, and ranſom at the king's will, "and ſatisfaction to the party arreſted." 50 Ed. 3. c. 5. 1 R. 2. c. 15.

Alſo it is ſaid, that arreſts in civil caſes ought not to be of perſons going to or coming from church; but that a warrant from a juſtice of the peace for the king may be executed in ſuch caſes. *Cro. Car.* 602. *Cro. Jac.* 321. 2 *Bulſt.* 72.

But altho' the officer may be puniſhed for the ſame either in the ſpiritual or temporal courts, yet the arreſt (if not on a Sunday) is good in law. *Watſon*, c. 34. p. 344.

Brawling in the church or church yard.

6. "If any perſon ſhall, by words only, quarrel, chide, or brawl, in any church or church "yard, the ordinary (on proof of two witneſſes) "may ſuſpend every layman, being an offender, "*ab ingreſſu eccleſiæ*; and every clergyman from "the miniſtration of his office, ſo long as he ſhall think meet." 5 & 6 Ed. 6. c. 4. ſ. 1.

7. "If

7. "If any ſhall ſmite, or lay any violent hands on another in any church or church yard, he ſhall be deemed *ipſo facto* excommunicate, and be excluded from the fellowſhip and company of *Chriſt*'s congregation." 5 & 6 Ed. 6. c. 4. ſ. 2. *Striking in the church or church yard.*

Lay any violent hands] But churchwardens, or perhaps private perſons, who whip boys for playing in the church, or pull off the hats of thoſe who obſtinately refuſe to take them off themſelves, or gently lay their hands on thoſe who diſturb the performance of any part of divine ſervice, and turn them out of the church, are not within the meaning of this ſtatute. 1 *Haw.* 139.

Shall be deemed ipſo facto *excommunicate*] And he ſhall not excuſe himſelf by ſhewing that the other aſſaulted him. 1 *Haw.* 139.

Ipſo facto] Nevertheleſs, in this and other like caſes, there ought either to be a precedent conviction at law, which muſt be tranſmitted to the biſhop; or elſe the excommunication muſt be declared in the ſpiritual court upon a proper proof of the offence there; for it is implied in every penal law, that no one ſhall incur the penalty * thereof, till he be found guilty upon a lawful trial. 1 *Haw.* 139. *339

8. "If any ſhall maliciouſly ſtrike another with any weapon, in any church or church yard, or ſhall there draw any weapon with intent to ſtrike, and ſhall be convicted thereof by verdict of 12 men, or confeſſion, or by two witneſſes, before the judges of aſſize, or juſtices of the peace in their ſeſſions, he ſhall be adjudged to have one of his ears cut off; and if he have no ears, he ſhall be burned in the cheek with a hot iron having the letter *F*, whereby he may he known and taken for a fray maker and fighter; and he ſhall alſo ſtand *ipſo facto* excommunicate." 5 & 6 Ed. 6. c. 4. ſ. 3. *Striking with a weapon in the church or church yard.*

9. He who ſteals goods belonging to a pariſh church, may be indicted for ſtealing the goods of the pariſhioners. 1 *Haw.* 94. *Sacrilege.*

For other matters, ſee title *Churchwardens*.

CHURCHWARDENS.

I. Who are exempted from being churchwardens.
II. Chuſing and ſwearing of churchwardens, with the duty thereupon.
III. Their duty in levying rates; and therein of veſtries, and ſelect veſtries.
IV. Their duty as to repairs; and therein concerning church ſeats.
V. Their duty as to ſundry other matters.
VI. Concerning preſentments; and therein of ſideſmen or aſſiſtants.
VII. Their accounting.
VIII. Their puniſhment on miſbehaviour.
IX. Their indemnity on doing their duty.

I. Who are exempted from being churchwardens.

Attorney. 1. A Counſellor or attorney ought not to be choſen churchwarden: and if he is, he may have a prohibition, by reaſon of his attendance on the courts at *Weſtminſter*. 2 Roll's Abr. 272.

Apothecaries and ſurgeons. 2. Apothecaries, who have ſerved 7 years, ſhall be exempted from the office of churchwarden. 6 W. c. 4.

*340 * And by the 18 G. 2. c. 15. Freemen of the corporation of ſurgeons in *London* are exempted from being churchwardens.

Diſſenting miniſters. 3. Diſſenting teachers or preachers, in holy orders, or pretended holy orders, being duly qualified, are exempted from the office of churchwarden. 1 W. ſeſſ. 1. c. 18.

Other diſſenters. 4. Other diſſenters, ſcrupling to take upon them the office, may execute the ſame by a ſufficient deputy, to be approved of in like manner as other churchwardens. 1 W. ſeſſ. 1. c. 18.

Perſons having convicted a felon. 5. All perſons who have proſecuted a felon to conviction, and the firſt aſſignee of the certificate thereof, are exempted from the office of churchwarden, in the pariſh where the offence was committed. 10 & 11 W. c. 23. ſ. 2.

6. No

6. No private man, perſonally ſerving for himſelf in the militia, during the time of ſuch ſervice, ſhall be liable to ſerve as churchwarden. 2 G. 3. c. 20. *Perſons ſerving in the militia.*

II. Chuſing and ſwearing churchwardens, with their duty thereupon.

1. Churchwardens ſhall be choſen yearly in *Eaſter* week, by the joint conſent of the miniſter and pariſhioners, if it may be; but if they cannot agree, the miniſter ſhall chuſe one, and the pariſhioners another. *Canons* of 1603. 89. *When to be choſen and by whom.*

But where there is a cuſtom for the pariſhioners to chuſe both, that cuſtom ſhall continue. *Gibſ. Codex*, 242.

2. A perſon choſen churchwarden, refuſing to take his office and oath, may be excommunicated for the refuſal; and no prohibition will lie. *Gibſ.* 243. *Refuſing to take the office.*

3. And the eccleſiaſtical judge refuſing to ſwear him, may be compelled by a mandamus. *Gibſ.* 243. *Refuſing to ſwear them.*

4. The churchwarden's oath, as ſaid to have been agreed on, upon mutual conſultation between the civilians and common lawyers, is as follows: *Churchwarden's oath.*

"You ſhall ſwear truly and faithfully to execute the office of a "churchwarden within your pariſh, and according to the beſt of "your ſkill and knowledge preſent ſuch things and perſons as to "your knowledge are preſentable by the laws eccleſiaſtical of this "realm: So help you God and the contents of this book." *Gibſ.* 243.

5. Churchwardens being thus ſworn, are ſo far incorporated by law, as to ſue for the goods of the church, and to bring an action of treſpaſs for them; and alſo to purchaſe goods for the uſe of the pariſh; but they are not a * corporation in ſuch ſort, as to purchaſe lands, or take by grant, except in *London* by cuſtom. *Gibſ.* 241. *Churchwardens a body corporate.* *341

6. Churchwardens ſhall continue in office, till the new churchwardens be ſworn. *Can.* 118. *How long they ſhall continue.*

III. Their duty in levying rates; and therein of veſtries and ſelect veſtries.

Summoning a veſtry.

1. The rates muſt be made with the conſent of the major part of the pariſhioners, houſekeepers, or occupiers of land. In order to which, public notice of a veſtry (a place ſo called from the veſtments of the miniſter kept there) ought to be given the *Sunday* before, either in the church after divine ſervice is ended, or elſe at the church door as the pariſhioners come out; both of the calling of the ſaid meeting, and alſo of the time and place of the aſſembling of it. And it will be faireſt then alſo to declare for what buſineſs the ſaid meeting is to be held, that no one may be ſurprized, but that all may have full time before, to conſider what is to be propoſed at the ſaid meeting. And it is uſual that for half an hour before it begins, one of the church bells be tolled to give the pariſhioners notice when they are met. 5 *Co.* 67. *Shaw. Par. Law.* 54.

Who ſhall have a vote in the veſtry.

2. At the common law, every pariſhioner who paid to the church rates, and no other, had a right to vote. *Shaw.* 56. And thoſe that pay no church rates ſhall have no vote in affairs relating to it, except it be the rector or vicar. *Wood*, b. 1. c. 7.

Who may adjourn the veſtry.

3. All perſons who have a vote in the veſtry have an equal right, and neither the miniſter nor churchwardens, without a ſpecial cuſtom, can adjourn the veſtry; but this can only be done by a majority of the whole aſſembly. *Str.* 1047.

Laying the rates.

4. When the churchwardens and pariſhioners are there met, they are to conſider what ſum of money it will be neceſſary to raiſe for ſuch repairs as ſhall then be needful; and after they have agreed what ſum is fit, they are to make an equal levy. *Degge* 171.

Majority to bind the pariſh.

5. And the major part of them that appear, ſhall bind the pariſh; or if none appear, the churchwardens alone may make the rate; becauſe they, and not the pariſhioners, are to be cited and puniſhed, in defect of repairs. *Gibſ.* 220.

Entring book.

6. It is moſt convenient, that every pariſh act there be entered in the pariſh book of accounts, and every man's hand conſenting to it be ſet thereto; for then it will be a certain rule for the churchwardens to go by. *Shaw.* 55.

7. By

7. By cuſtom there may be ſelect veſtries, of a certain number of perſons elected yearly to make rates, and manage the concerns of the pariſh for that year: and ſuch cuſtom is a good cuſtom. *Read.* Ch. Service. *Gibſ* 246. *Str.* 428. *Select veſtry.* *342

8. It is holden, that a rate for the reparation of the fabrick of a church is real, charging the land, and not the perſon; but a rate for ornaments is perſonal, upon the goods, and not upon the land. *Gibſ.* 220. *Two rates; one for the fabric, another for ornaments.*

And in *Jeffery*'s caſe, 5 *Co.* 67. it was ſolemnly adjudged, that the rates for the repair of the church ſhall be laid upon every occupier of lands in the pariſh, altho' ſuch occupier live in another pariſh; and ſuch perſon may come to the veſtries of the pariſhioners, and vote in the making a rate: but he ſhall not be charged towards the ornaments of the church, as for bells, repair of ſeats, bread and wine, clerk's wages, viſitation charges, and the like, by reaſon of ſuch lands; for that the perſonal eſtates of the inhabitants are chargeable with every thing that doth not relate to the fabrick of the church, or repairs of the fences of the church yard, or ſuch other things as concern the freehold.

And therefore ſome have been of opinion, that churchwardens ſhould make two rates; one upon lands and houſes, which may concern the freehold of the church, and another upon perſonal eſtates and ſtock, to defray other expences. But as this method creates confuſion, ſo it is ſeldom practiſed.

And Sir *Simon Degge* ſays, that he conceives the law to be clear otherwiſe; and that a foreigner who holds lands in the pariſh is as much obliged to pay towards the bells, ſeats, and ornaments, as to the repair of the church; otherwiſe there would be great confuſion in making ſeveral levies, which he never obſerved to be practiſed within his knowledge. But he leaves it a query, among a diverſity of opinions. p. 173.

And Mr. *Shaw*, in his pariſh law, having cited the authors who hold theſe different opinions, ſays, that the practice generally now goes according to the opinion laſt mentioned, namely, that foreigners occupying lands within the pariſh ſhall be charged to both; and that the eccleſiaſtical judges, as well as the temporal, for the eaſe and convenience which accrues from the making of one levy for all, do give countenance thereto, and begin to treat the contrary opinion as obſolete and out of doors. p. 92.

9. A taxation by the pound rate is the moſt equitable way, and not according to the quantity of the land. *Wood*, b. 1. c. 7. *Equal pound rate.*

* 10. Where lands are in farm, not the leſſor, but the tenant ſhall be rated and pay. *Gibſ.* 221. *Tenant to be charged, and not the landlord.* *343

Impropriator how far chargeable.

11. An impropriator, tho' bound to repair the chancel, is also bound to contribute to the reparations of the church, if he hath lands in the parish, which are not parcel of the parsonage. *Gibs.* 221, 223.

Appeal against the rates.

12. If any person find himself aggrieved at the inequality of the assessment, his appeal must be to the ecclesiastical judge. *Degge.* 172.

And in such case, if he will be relieved, he must shew, that he is illegally or unequally taxed in respect of the quantity of his land, as being rated for more than he has, or that the land which he hath is over-rated, or that the rate was needless, or that some lands in the parish are omitted in the rate. *Wood*, b. 1. c. 7.

Rates how to be recovered.

13. If any refuse to pay the rates, being demanded by the churchwardens, they are to be sued for in the ecclesiastical courts and not elsewhere. *Gibs.* 219. *Degge* 171.

Also a quaker, refusing to pay church rates, may be sued, as other parishioners, in the ecclesiastical court; or he may be prosecuted before the justices of the peace, in the same manner as for his tithes.

IV. Their duty as to repairs; and therein concerning church seats.

Who shall repair.

1. Of common right, the soil and freehold of the church is the parson's; the use of the body of the church, and the repair of it, common to the parishioners; and the disposing of the seats therein, the right of the ordinary. *Gibs.* 221.

Who may compel the repairs to be made.

2. The spiritual court may compel the parishioners to repair the body of the church, and may excommunicate every one of them till it be repaired; but those that are willing to contribute shall be absolved, till the greater part agree to a tax. *Read.* Ch. Service.

Difference between adding something new and repairing the old.

3. If the churchwardens erect or add any thing new, either to the fabrick of the church, utensils, or churchyard, they must have the consent of the parishioners; and if such additions are in the church, the bishop's licence is also necessary. But where necessary repairs are wanting, the greater part of the parish will bind the less; and if the major part will not consent, where repairs are necessary, the churchwardens may repair without their consent, if upon notice given they refuse to meet, or when they are met, refuse to make a rate. But if a church fall down,

down, * the parishioners are not bound to rebuild it. *Read.* Ch. Service. 1 *Vent.* 367. * 344

4. But if a church be so much out of repair, that it is necessary to pull it down, or so little, that it needs to be enlarged, the major part of the parishioners may make a rate for new building or enlarging, as there shall be occasion. This was declared in the 29 C. 2. by all the three courts successively; notwithstanding the cause was laboured by a great number of quakers, who opposed the rate. *Gibs.* 221. *Majority may rebuild.*

5. The parson, that is, the spiritual rector, as also the lay-impropriator, are bound by common right to repair the chancel, and is thereupon intitled to the chief seat therein, unless another hath it by prescription; yet he hath not the disposal of the seats therein, but the bishop. *Gibs.* 223, 224. *Repairing the chancel.*

6. An isle in a church, which hath time out of mind belonged to a particular house, and been maintained and repaired by the owner of that house, is part of his frank tenement, and the ordinary cannot dispose of it, or intermeddle in it. *Repairing an isle.*

7. A seat, or priority in a seat, in the body of the church, may be prescribed for as belonging to a house, if it hath been used, and also repaired, time out of mind, by the inhabitants of such house. *Gibs.* 221. *Seat inseparable from the house.*

And no one can claim a seat in a church by prescription as appendant or belonging to land; but it must be laid as belonging to a house, in respect to the inhabitancy thereof. *Wood,* b. 1. c. 7.

And therefore a seat may not be granted to a person and his heirs absolutely; for the seat doth not belong to the person, but to the inhabitant. *Gibs.* 221.

V. Their duty as to sundry other matters.

1. Every churchwarden is an overseer of the poor, altho' every overseer of the poor is not a churchwarden. 43 El. c. 2. s. 1. *Overseer.*

And in M. 15 C. 2. A churchwarden was committed by the two next justices, as churchwarden, for refusing to account for the money received and disbursed by him; but on an *habeas corpus* he was discharged: because by the warrant of commitment it ought to appear that he was overseer of the poor, for by the statute of 43 El. that is annexed to his office of churchwarden, and the justices have no jurisdiction over him as churchwarden, but as overseer. *Dalt.* 186.

* 2. They are to see that the church ways be well kept and repaired. And the right to a church way *Church way.* * 345

way may be claimed and maintained by a libel in the ſpiritual court. 2 *Roll's Abr.* 287.

Vacancy. 3. Churchwardens have the care of a benefice during its vacancy: Having firſt taken out a ſequeſtration from the ſpiritual court, they are to manage all the profits and expences of the benefice for him that ſhall next ſucceed; plough and ſow his glebe; take in the crop; collect tithes; thraſh out and ſell corn; repair houſes and fences, and the like. And they ſhall take care that during the vacancy the church ſhall be duly ſerved by a curate approved by the biſhop, whom they are to pay out of the profits of the benefice. And if the ſucceſſor thinks himſelf aggrieved by them he may appeal to the eccleſiaſtical judge. *Par. L.* 99. *Com. Par. Off.* 90.

Worldly calling on the Lord's day. 4. They (or the conſtable) ſhall levy the penalties for perſons exerciſing their worldly calling on the Lord's day. 29 C. 2. c. 7.

Profanation of the church. 5. They ſhall ſuffer no plays, feaſts, banquets, ſuppers, church ales, drinkings, temporal courts or leets, lay juries, muſters, or any profane uſage, to be kept in the church or church yard. *Can.* 88.

Attending divine ſervice. 6. They ſhall ſee that the pariſhioners reſort to church, and continue there orderly, during divine ſervice; and ſhall preſent the defaulters. *Can.* 90.

Loitering in the church yard. 7. They ſhall not ſuffer any idle perſons to abide either in the church yard, or church porch, during the time of divine ſervice or preaching; but ſhall cauſe them to come in, or to depart. *Can.* 19.

Levying 12d a Sunday for not coming to church. 8. They ſhall levy the forfeiture of 12d a Sunday on the goods of perſons not coming to church. 1 El. c. 2.

Sports on the Lord's day. 9. They (or the conſtable) ſhall levy the penalty of 3s 4d, for uſing unlawful paſtimes on the Lord's day.

Conventicle. 10. They (or the conſtables or overſeers) ſhall levy the penalties for being preſent at unlawful conventicles. 22 C. 2. c. 1.

Recuſants. 11. They ſhall, on pain of 20l, preſent at the ſeſſions once a year, the monthly abſence from church of all recuſants, and the names and ages of their children above nine years old, and the names of their ſervants. And if the party preſented ſhall be indicted and convicted, the churchwardens ſhall have a reward of 40s, to be levied of the recuſants goods, by warrant of the juſtices in ſeſſions. 3 J. c. 4.

*346 *Excommunicate perſons.* * 12. They ſhall keep excommunicated perſons out of the church. *Can.* 85.

13. They

13. They ſhall take care to have in the church a large bible, book of common prayer, book of homilies, a font of ſtone, a decent communion table, with proper coverings, the ten commandments ſet up at the eaſt end, and other choſen ſentences upon the walls, a reading deſk, and pulpit, and cheſt for alms; all at the charge of the pariſh. *Can.* 80, 81, 82, 83, 84. *Ornaments of the church.*

14. They ought to keep the keys of the belfrey, and to take care that the bells be not rung without good cauſe, to be allowed by the miniſter and themſelves. *Can.* 88. *Bells.*

15. They ſhall have a box, wherein to keep the regiſter, with three locks and keys, two keys to be kept by them, and one by the miniſter; and every Sunday they ſhall ſee that the miniſter enter therein all chriſtenings, weddings, and burials that have been the week before; and at the bottom of every page, they ſhall (with the miniſter) ſubſcribe their names. And they ſhall, within a month after *March* 25, yearly, tranſmit to the biſhop a copy thereof for the year before ſubſcribed as above. *Regiſter.*

And ſuch regiſter, being carefully preſerved, is good evidence; and the falſifying of it is puniſhable at the common law. *Gibſ.* 229.

16. They ſhall at the charge of the pariſh, with the advice and direction of the miniſter, provide bread and wine againſt the communion. *Can.* 20. *Communion.*

17. They (or the overſeers) ſhall levy the penalty of 5l for an incumbent not reading the common prayer once a month. 13 & 14 C. 2. c. 4. *Incumbent.*

18. They ſhall collect money on charity briefs, on pain of 20l. 4 An. c. 14. *Charity briefs.*

19. They ſhall not ſuffer any ſtrangers to preach, but ſuch as ſhall appear qualified on ſhewing their licence; and they ſhall ſee that ſuch preachers regiſter or ſubſcribe their names in a book to be kept for that purpoſe, with the day when they preached, and the biſhop's name who granted the licence. *Can.* 50, 52. *Strange preachers.*

20. They ſhall, on certificate from the miniſter, apply to the magiſtrates for conviction of offenders in not burying in woollen. 30 C. 2. c. 3. *Burying in woollen.*

21. Perſons who murder themſelves, or die excommunicated, are denied chriſtian burial; and therefore the churchwardens are not to ſuffer them to be buried in the church or church yard, without ſpecial licence from the biſhop. *Degge*, 183. *Perſons denied chriſtian burial.*

* 22. They ſhall levy the penalties for eating fleſh on fiſh days. 5 El. c. 5. *Eating fleſh on fiſh days.* *347

23. They

Gaming. 23. They ſhall receive the penalties for ſervants, labourers, apprentices, or journeymen gaming in publick houſes. 30 G. 2. c. 24.

Drunkenneſs. 24. They ſhall receive the penalties for tipling and drunkenneſs. 4 G. c. 5. 21 G. 2. c. 7.

Suffering tipling. 25. They (or the conſtable) ſhall levy the penalty for ſuffering tipling. 1 J. c. 9.

Spirituous liquors. 26. They ſhall receive the penalties for hawking ſpirituous liquors. 9 G. 2. c. 23.

Corn. 27. They (or the overſeers) ſhall levy the penalty for ſelling corn by a wrong meaſure. 22 C. 2. c. 8.

Butter and cheeſe. 28. They (or the overſeers) ſhall receive the penalties relating to butter and cheeſe. 13 & 14 C. 2. c. 6.

Weights and meaſures. 29. They (or the overſeers) ſhall levy the penalties relating to weights and meaſures. 16 C. c. 19. 22 C. 2. c. 8.

Hawkers and pedlars. 30. They ſhall carry hawkers and pedlars trading without licence, before a juſtice of the peace. 9 & 10 W. c. 27.

Militia. 31. They ſhall provide cheſts wherein to lock up the arms, clothes, and accoutrements of the militia. 2 G. 3. c. 20.

Greenwich hoſpital. 32. They, together with the miniſter, are to ſign certificates for the out-penſioners of *Greenwich* hoſpital, reſiding within their pariſh, with reſpect to the identity of their perſons, in order to the receiving of their penſions. 3 G. 3. c. 16.

County rate. 33. They (or the overſeers) ſhall pay to the high conſtables the general county rate, out of their money collected for the poor. 12 G. 2. c. 29.

Servants firing houſes. 34. They ſhall receive the penalty for ſervants careleſly firing houſes. 6 An. c. 31.

Tracing hares. 35. They ſhall receive the penalties for tracing hares in the ſnow (and other game penalties.) 1 J. c. 27.

Surveyors of the highways. 36. They ſhall join with the conſtable and ſurveyor of the highways in chuſing and returning new ſurveyors. 13 G. 3. c. 78.

VI. *Of preſentments; and therein concerning ſideſmen or aſſiſtants.*

1. Churchwardens by their oath are to preſent or certify to the biſhop, or his officer, all things preſentable by the eccleſiaſtical laws, which relate to the church, miniſter, and pariſhioners. *Oath to preſent.*

* 2. The articles delivered to them for their direction, are for the moſt part founded on the book of canons made in the year 1603, and the rubricks of the common prayer. *Book of articles.* *348

3. There are alſo ſeveral things which they are bound to preſent by act of parliament; as tipling or drunkenneſs, by the ſtatute of 4 J. c. 5. recuſants by 3 J. c. 4. *Statute preſentments.*

4. They may preſent as often as they pleaſe, but ſhall not be obliged above once a year where it hath ſo been uſed, and not above twice any where; except it be at the biſhop's viſitation. *Can.* 116, 117. *When to preſent.*

5. For the preſentments of any church or chapel for one year, the regiſter ſhall have only 4d. *Can.* 116. *Fee for taking in preſentments.*

6. The miniſter may preſent where the churchwardens neglect. *Can.* 113. But ſuch preſentment ought to be upon oath. 2 *Vent.* 42. *Miniſter may preſent.*

7. In larger pariſhes, there are officers called ſideſmen (antiently ſynodſmen, otherwiſe called queſtmen) to aſſiſt the churchwardens in their inquiries and preſentment of offenders: They ſhall be choſen yearly in *Eaſter* week by the miniſter and pariſhioners, if they can agree; if not, by the biſhop. *Can.* 90. *Sideſmen.*

8. The ſideſman's oath, ſaid to have been agreed on by the civilians and common lawyers, is this: *Sideſman's oath.*

"You ſhall ſwear, that you will be aſſiſtant to the churchwar-
"dens in the execution of their office, ſo far as by law you are
"bound: So help you God." *Gibſ.* 242.

VII. *Their accounting.*

1. At the end of the year, or within a month after at moſt, they ſhall before the miniſter and pariſhioners (at a veſtry) give up a juſt account of *When to account.*

ſuch money as they have received, and alſo what they have particularly beſtowed in reparations, and otherwiſe, for the uſe of the church; and ſhall deliver up to the pariſhioners the money and pariſh goods in their hands, to be delivered over by them to the next churchwardens by bill indented. *Can.* 89.

How compelled to account.

2. And if they refuſe, they may be preſented at the next viſitation by the new churchwardens; or any of the pariſh that are intereſted may by proceſs call them to account before the ordinary; or the ſucceeding churchwardens may have a writ of account at common law. And if they have diſburſed more than they have received, the ſucceeding churchwardens ſhall pay what is due to them, and account it among their diſburſements. 1 *Roll's Abr.* 121.

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Accounting to a ſelect veſtry.

* 3. If the cuſtom of the pariſh is, for a certain number of perſons to have the government thereof, and the account is given up to them; the cuſtom is a good cuſtom, and the account given to them a good account. *Gibſ.* 242.

Vouchers.

4. Mr. *Barlow* ſays, that for diſburſements of any ſum not above 40s, their own oath is held ſufficient proof; but for all ſums above, receipts muſt be produced. *Barl.* 105. But it may be more ſatisfactory if receipts be produced for all.

Allowance of the account.

5. The allowance of the account may be by entring it in the church book of accounts, and having it ſigned by thoſe in the veſtry who allow the accounts. *Barl.* 105.

Account allowed final.

6. When they have faithfully accounted, and their account is allowed by the miniſter and major part of the pariſhioners preſent, it ſhall not afterwards be in the power of any to make them account again: unleſs ſome fraud in their accounts is afterwards diſcovered. *Wood*, b. 1. c. 7.

E. 7 G. 2. *Wainright* and *Bagſhaw.* The churchwardens were cited into the court of *Litchfield* to account. They pleaded, that they had accounted at the veſtry according to law. Which plea was rejected; and thereupon a prohibition was granted: for the ordinary is not to take the account, he can only give a judgment that they do account; and to what purpoſe ſhould they be ſent back, to thoſe who have taken their accounts already. *Str.* 974, 1133.

VIII. Their puniſhment on miſbehaviour.

Churchwardens committing waſte.

1. If the churchwardens waſte the goods of the church, the new churchwardens may call them to an account before the biſhop, or bring their action at common law. *Read.* Ch. Service.

2. And

2. And whereas many churchwardens and overſeers, and other perſons intruſted to receive collections for the poor, and other publick monies relating to the churches and pariſhes whereunto they belong, do often miſpend the ſame, to the prejudice of ſuch pariſhes, and of the poor and other inhabitants thereof; and the pariſhioners, who are the only perſons ſometimes who can make proof thereof, have not been allowed to be witneſſes againſt them: it is enacted, that in all actions to be brought in any court at *Weſtminſter*, or at the aſſizes, for the recovery thereof, the evidence of the pariſhioners, other than ſuch as receive alms, ſhall be taken and admitted. 3 W. c. 11. ſ. 12. *Pariſhioners may be evidence againſt them.*

3. But churchwardens are not anſwerable for indiſcretion, but for deceit only, if they lay out more money than is needful. *Wood*, b. 1. c. 7. *Not anſwerable for indiſcretion.*

IX. Their indemnity on doing their duty. *350

If any action be brought againſt any churchwardens, or perſons called ſworn men, executing the office of churchwarden, for any thing done by virtue of their office, they may plead the general iſſue, and give the ſpecial matter in evidence: and if a verdict is given for them, or the plaintiff ſhall be nonſuit, or diſcontinue, they ſhall have double coſts. 7 J. c. 5. 21 J. c. 12. *Double coſts.*

In *Kerchival*'s caſe, M. 8 Car. An action was brought againſt the churchwardens for a preſentment upon common fame of incontinency. Upon not guilty, it was found for the churchwardens, and moved, that they might have double coſts: But it was reſolved, that this being eccleſiaſtical, it is not within this ſtatute; for that the ſtatute was never intended, but where they ſhall be vexed concerning temporal matters, which they ſhall do by virtue of their office, and not for preſentments concerning matters of fame. *Cro. Car.* 285, 286.

CLERGY.

I. Clergymen.
II. Benefit of clergy.

I. Clergymen.

Liable to the poor.

1. BY the 43 El. c. 2. Clergymen are liable to the poor rates, for their glebe and tithe.

And to the highways.

2. And Mr. *Hawkins* ſays, clergymen are within the purview of the ſtatutes relating to the repair of highways, in reſpect of their ſpiritual poſſeſſions, as much as any other perſons whatſoever in reſpect of any other poſſeſſions; for the words are general, and there is no kind of intimation therein that any particular perſons ſhall be exempted more than others. 1 *Haw.* 204.

And to other publick charges.

3. And it ſeems to be now generally ſettled, that clergymen are liable to all publick charges impoſed by act of parliament, where they are not ſpecially excepted.

Shall not farm.

4. No clergyman ſhall take to farm any lands (except he have not ſufficient glebe for the expences of his houſhold; on pain of 10l a month, half to the king, and half to him that ſhall ſue. 21 H. 8. c. 13.

Shall not buy
* 351 *to ſell again.*

5. No clergyman ſhall buy to ſell again any cattle, corn, fiſh, wool, wood, victual, or any manner of merchandize; * on pain of treble value, half to the king, and half to him that ſhall ſue: and the contract ſhall be void. 21 H. 8. c. 13.

Shall not keep a tanhouſe or brewhouſe.

6. No clergyman ſhall keep any tanhouſe, or any brewhouſe but for his own houſe; on pain of 10l a month, half to the king, and half to him that ſhall ſue. 21 H. 8. c. 13.

May be impriſoned for incontinency.

7. The ordinary may puniſh clergymen for incontinency, by committing them to ward or priſon by his diſcretion. 1 H. 7. c. 4.

Privileges againſt an aſſault.

8. A perſon laying violent hands on a clergyman, may be puniſhed in the eccleſiaſtical court. 13 Ed. 1. ſt. 4. 2 Inſt. 492.

May have the benefit of clergy more than once.

9. Clergymen in holy orders may have the benefit of clergy a ſecond, or third time, or oftener. 2 H. H. 374, 375.

10. A clerk

10. A clerk in holy orders ſhall not be burned in the hand, but ſhall have the ſame privilege as if he had been burnt in the hand; and therefore ſhall not be drawn in queſtion in the eccleſiaſtical court, to deprive him, or inflict any eccleſiaſtical cenſure upon him. 2 H. H. 389. *Shall not be burnt in the hand.*

11. To the intent that clergymen may the better diſcharge their duty in celebration of divine ſervice, and not be intangled with temporal buſineſs; if any of them be choſen to any temporal office, he may have his writ to be diſcharged. 1 Inſt. 96. *Shall not ſerve in temporal offices.*

12. Eccleſiaſtical perſons have this privilege, that they ought not in perſon to ſerve in war. 2 Inſt. 4. *Shall not ſerve in war.*

13. Eccleſiaſtical perſons are not bound to appear at the torn, or view of frankpledge. 52 H. 3. c. 10. 9 Ed. 2. c. 3. 2 Inſt. 4. *Need not appear at the torn.*

14. No clergyman ſhall be arreſted in any church or church yard, whilſt he attends to divine ſervice; on pain of impriſonment of the offender, and ranſom at the king's will, and gree to the party arreſted. 50 Ed. 3. c. 5. 1 R. 2. c. 15. *Shall not be arreſted in the church.*

But the arreſt notwithſtanding (if not on a Sunday) is good in law. *Watſon*, c. 34. p. 344.

15. The body of a clergyman may not be taken by force of any proceſs upon a ſtatute ſtaple, or ſtatute merchant. 2 Inſt. 2. *Shall not be taken on a ſtatute ſtaple.*

16. If an action of treſpaſs, debt, account, or other action wherein proceſs of *capias* lies, be brought againſt a clerk in holy orders, and the ſheriff return that he is a clergyman beneficed, having no lay fee in which he may be ſummoned, in this caſe the plaintiff cannot have a *capias* * to arreſt his body, but a writ to the biſhop to compel him to appear. 2 Inſt. 4. *Degge.* 157. *Nor on a capias.*

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17. If a perſon be bound in a recognizance in the chancery, or in any other court, and he pay not the ſum at the day; by the common law, if the perſon had nothing but eccleſiaſtical goods, the recognizee could not have a *levari facias* to the ſheriff to levy the ſame of theſe goods, but the writ ought to be directed to the biſhop to levy the ſame of his eccleſiaſtical goods. 2 Inſt. 4. *Sheriff ſhall not levy on his eccleſiaſtical goods.*

18. A clergyman ſhall be amerced only according to his lay tenement, and not after the quantity of his ſpiritual benefice. *Magna Chart.* c. 14. *Gibſ.* 15. *Shall not be amerced of his ſpiritual goods.*

19. Diſtreſſes ſhall not be taken by ſheriffs, or other of the king's miniſters, in the inheritance of the church wherewith it was anciently endowed; *Diſtreſs not to be made on his ſpiritual inheritance.*

ed; but otherwiſe it is of late purchaſe. 9 Ed. 2. c. 9. 2 Inſt. 4. *Gibſ.* 18.

Shall not pay toll of his ſpiritual goods.

20. A clergyman is not bound to pay tolls or other like cuſtoms, for his eccleſiaſtical goods; and if he be moleſted therefore, he may have a writ for his diſcharge. 2 Inſt. 4. *Gibſ.* 21.

And this not only for all the goods and merchandizes of clergymen gotten upon their church livings, but alſo for all goods and merchandizes by them bought, to be ſpent upon their rectories and church livings. *Degge.* 153.

Obſervation.

21. Lord *Coke*, in his readings on the *Magna Charta*, ſays thus; "True it is, that eccleſiaſtical perſons have more and greater liberties than other of the "king's ſubjects, wherein to ſet down all would take up a whole "volume of itſelf, and to ſet down no example agreeth not with "the office of an expoſitor; therefore ſome few examples ſhall be "expreſſed, and the ſtudious reader left to obſerve the reſt as he "ſhall read them in our books, and other authorities of law." And the inſtances he gives, are chiefly thoſe which are mentioned above; nevertheleſs I do not find any author ſince his time, who hath ſaid what are thoſe other many and great privileges of the clergy; but the authors do generally adhere to theſe particular inſtances, probably as being ſupported by ſo great an authority: Other privileges have been aboliſhed ſince his time by acts of parliament, and the adjudications of the temporal courts; and others perhaps loſt by diſuſe; and poſſibly ſome of the inſtances abovementioned would have been good likewiſe, or not looked upon as of ſo much authority, if they had not been vouched by lord *Coke*.

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* II. Benefit of clergy.

I. Original of the benefit of clergy.
II. By what perſons it may be demanded.
III. In what caſes it may be demanded.
IV. At what time it muſt be demanded.
V. Effect of clergy allowed.

I. Original of the benefit of clergy.

Original of the benefit of clergy.

ANciently princes and ſtates, converted to Chriſtianity, in favour of the clergy, and for their encouragement in their offices and employments, and that they might not be ſo much intangled in ſuits, did grant to the clergy very bountiful privileges and

and exemptions; and particularly, an exemption of their perſons from criminal proceedings, in ſome capital caſes before ſecular judges; which was the true original of the benefit of clergy.

The clergy increaſing in wealth, power, honour, number, and intereſt, afterwards ſet up for themſelves; and that which they obtained by the favour of princes and ſtates at firſt, they now began to claim as their right, and a right of the higheſt nature, namely, by the law of God; and by their canons and conſtitutions endeavoured, and in ſome places obtained, vaſt extenſions of theſe exemptions, both with regard to the perſons concerned, to wit, not only to perſons in holy orders, but alſo to all that had any kind of ſubordinate miniſtration relative to the church; and likewiſe in reſpect of the cauſes, exempting as far as they could all cauſes of clergymen, as well civil as criminal, from the juriſdiction of the ſecular power, and wholly ſubordinating them immediately and only to the eccleſiaſtical juriſdiction, which they ſuppoſed to be lodged firſt in the pope by divine right and inveſtiture from Chriſt, and from the pope ſhed abroad into all ſubordinate and eccleſiaſtical juriſdiction.

And by this means they endeavoured, and in ſome kingdoms and for ſome ages obtained, that there was a double ſupreme power in every kingdom: the one eccleſiaſtical, abſolute, and independent upon any but the pope, over eccleſiaſtical men and cauſes; and the other ſecular, of the king, or civil magiſtrate.

But this claim of exemption, altho' it obtained much in this kingdom, yet grew ſo burthenſome, that it was from time to time qualified and abridged by the civil power, ſometimes by acts of parliament taking it away in * ſome caſes, ſometimes by the interpre- * 354
tation and conſtruction of the judges, and ſometimes by the contrary uſage of the kingdom: for eccleſiaſtical canons never bound in *England* farther than they were received, and ſo had not their authority from their own ſtrength and obligation, but from the uſages and cuſtoms of the kingdom that admitted them, and only ſo far forth as they were ſo admitted.

And therefore if they were indicted in caſes criminal, but not capital, nor wherein they were to loſe life or limb, there the privilege of clergy was not allowed; and therefore not in indictments of treſpaſs or petit larceny.

Alſo it was not allowed them in high treaſon.

But, at the common law, in all caſes of felony or petit treaſon, clergy was allowable, excepting two, lying in wait, and burning of houſes, (which were looked upon as hoſtile acts, and the authors of them therefore not intitled to the common privileges of ſubjects.) 2 H. H. 323—330.

II. By what perſons it may be demanded.

Who may demand it.

1. By a favourable interpretation of the ſtatutes relating to the benefit of clergy, not only thoſe actually admitted into ſome inferior orders of the clergy, but alſo thoſe who were never qualified to be admitted into orders (which was formerly tried by putting them to read a verſe) have been taken to have a right to this privilege, as much as perſons in holy orders. 2 *Haw.* 338.

Others beſides clergymen.

Women.

2. But by the common law a woman could not have the benefit of clergy: but now by the ſtatute of 3 W. c. 9. a woman convicted or outlawed for any felony for which a man might have his clergy, ſhall, upon praying the benefit of the ſtatute, be ſubject only to ſuch puniſhment as a man would be in the like caſe.

Hereticks, Jews, Turks, perſons excommunicate.

3. Lord *Hale* ſays, a perſon convicted of hereſy, a Jew, or a Turk, ſhall not have their clergy; but a perſon excommunicate ſhall have his clergy. 2 H. H. 373.

But by the 5 An. c. 6. which aboliſhed the ceremony of reading, the wall of partition (as Sir *Michael Foſter* expreſſes it) between ſubject and ſubject under one and the ſame degree of guilt, is taken away; which meaſure intitled to the indulgence of the law, in common with the reſt of their fellow ſubjects, all thoſe who before were ſuppoſed to be under a legal incapacity for orders, as Jews, and ſome others were, and likewiſe thoſe who in preſumption of law were not qualified in point of learning, of which
*355 reading a ſcrap of Latin (viz. *miſerere mei Deus*) which * they called the *neck verſe*, was commonly made the teſt. And from this period, the meaſure of puniſhment hath been governed by the degrees of real guilt, and not by the function or abilities of the offender. *Foſt.* 305, 6.

Perſons having had clergy once.

4. By the 4 H. 7. c. 13. Every perſon (not being within orders) who hath once been admitted to his clergy, ſhall not be admitted to the ſame a ſecond time.

Burning in the hand.

5. And if he is convicted of murder, he ſhall be marked (unleſs he is a peer, 2 H. H. 376) with an M, on the brawn of the left thumb; and if for any other felony, with a T. 4 H. 7. c. 13.

6. But

6. But he ſhall not be ouſted of his clergy, by the bare mark in his hand, or by a parol averment, without the record teſtifying it, or a tranſcript thereof (according to the following ſtatutes). 2 H. H. 373. *Burning not a concluſive proof of the conviction.*

And therefore the burning in the hand ſeemeth now to be of little uſe, and (as Sir *Michael Foſter* obſerves) can ſcarcely be called even ſo much as a ſlight puniſhment; but rather a piece of abſurd pageantry, tending neither to the reformation of the offender, nor for example to others; to wit, burning the offender in the hand with an iron ſcarcely heated. *Foſt.* 372.

7. By 34 & 35 H. 8. c. 14. The clerk of the crown, or of the peace, or of aſſize, ſhall certify a tranſcript briefly of the tenor of the indictment, outlawry, or conviction, and attainder, into the king's bench in 40 days: And the clerk of the crown, when the judges of aſſize, or juſtices of the peace write to him for the names of ſuch perſons, ſhall certify the ſame with the cauſes of the conviction or attainder. *Conviction how to be certified.*

8. Another method is given by the 3 W. c. 9. which enacts, that the clerk of the crown, clerk of the peace, or clerk of aſſize, where a perſon admitted to clergy ſhall be convicted, ſhall at the requeſt of the proſecutor, or any other on the king's behalf, certify a tranſcript briefly and in few words, containing the effect and tenor of the indictment and conviction, of his having the benefit of clergy, and the addition of the party, and the certainty of the felony and conviction, to the judges where ſuch perſon ſhall be indicted for any ſubſequent offence. ſ. 7. *How it may be otherwiſe certified.*

9. Alſo it ſeems, that if the party deny that he is the ſame perſon, iſſue muſt be joined upon it, and it muſt be found upon trial that he is the ſame perſon, before he can be ouſted of clergy. 2 H. H. 373. *How tried whether he is the ſame perſon.*

* *III. In what caſes it may be demanded.* *356

1. By the 25 Ed. 3. ſt. 3. c. 4. All manner of clerks, who ſhall be convicted before the ſecular judges, for any treaſons or felonies, touching other perſons than the king himſelf, ſhall have the privilege of the holy church. *Formerly allowed in all felonies.*

2. Clergy was never allowed in this nation in caſes of high treaſon, nor is it allowed on indictments of petit larceny or treſpaſs; but by the above recited act, clergy was allowed in all treaſons and felonies, except treaſon againſt the king: So that after this ſtatute the benefit of clergy might be pleaded and allowed *But not in treaſon or petit larceny.*

in all other treaſons and felonies. *Hale's Pl.* 230. 2 H. H. 326.

Clergy taken away by ſtatutes.

3. Conſequently, wherever clergy is not allowable in any other caſes, it is taken away by ſome ſubſequent act of parliament. *Hale's Pl.* 230.

Allowed in new felonies, unleſs expreſsly taken away.

4. Conſequently, where a new felony is made by an act of parliament, clergy is to be allowed, unleſs expreſsly taken away by ſuch ſtatute. *Hale's Pl.* 230.

And if it maketh a new felony, and takes away clergy not generally, but in ſuch or ſuch caſes, regularly in other caſes, clergy is allowable. 2 H. H. 335.

But if the ſtatute enacts generally, that it ſhall be felony without benefit of clergy, or that he ſhall ſuffer as in caſe of felony without benefit of clergy, this excludes it in all circumſtances, and to all intents. 2 H. H. 335.

Therefore where clergy is excluded, the indictment muſt bring the offence within the ſtatute.

5. It follows further from what hath been ſaid, that in all caſes where an act of parliament ouſteth clergy, in caſe of any felony, the indictment muſt preciſely bring the party within the caſe of the ſtatute: otherwiſe, altho' poſſibly the fact itſelf be within the ſtatute, and it may ſo appear upon the evidence, yet if it be not ſo alledged in the indictment, the party, tho' convict, ſhall have his clergy. 2 H. H. 336.

But altho' the caſe be ſo laid in the indictment, that it comes within the ſtatute, to exempt the priſoner from clergy, yet if upon the evidence it fall out, that tho' it be a felony, yet it is not ſo qualified as laid in the indictment, the jury ought to find him guilty of the felony ſimply, but not as to the matter laid in the indictment, and thereupon the priſoner ſhall be admitted to his clergy; and this is commonly done. 2 H. H. 366.

Indictment on a ſtatute which ouſteth of clergy an offence which was felony at common law.

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6. But if the offence was capital at the common law, and a ſtatute only excludes it from clergy; the indictment, in ſuch caſe need not conclude *againſt the form of the ſtatute*, becauſe the ſtatute doth not alter the nature of the * offence, but leaves it to its proper judgment, and only takes away a perſonal privilege of exemption from ſuch judgment. 2 *Haw.* 342.

Acceſſary.

7. Furthermore, from what hath been obſerved above, it follows, that where an act taketh away clergy from the principal, and ſaith nothing of the acceſſary; the acceſſaries, as well before as after, ſhall have their clergy. 11 *Co.* 37. *Foſt.* 355.

IV. At what time it muſt be demanded.

To be demanded after conviction.

1. By the ancient common law, the benefit of clergy was demanded as ſoon as the priſoner was brought to the bar, before any indictment or other proceeding againſt him; but this was found a great inconvenience to the priſoner, becauſe poſſibly he might have been acquitted of the felony; or if not, yet in caſe of an inqueſt of office, he loſt his challenges to ſuch inqueſt, and yet upon ſuch inqueſt found, he forfeited his goods, and the profits of his lands; and therefore *Priſot* Ch. J. with the advice of the other judges, in the reign of H. 6. for the ſafety of the innocent, would not allow the priſoner the benefit of clergy before he had pleaded to the felony, and (having the benefit of his challenges and other advantages) had been convicted thereof: which courſe hath been generally obſerved ever ſince. 2 Inſt. 164. 2 H. H. 378.

May be allowed tho' not demanded.

2. And this benefit of clergy may be allowed by the court in diſcretion, tho' the party challenge it not. *Hale's Pl.* 239.

V. Effect of clergy allowed.

Perſons having their clergy may be continued in goal.

1. Perſons admitted to their clergy, may be continued in priſon as a further puniſhment, not exceeding one year. 18 El. c. 7.

May be tranſported.

2. And by 4 G. c. 11. Perſons convicted of offences within benefit of clergy (except receivers and buyers of ſtolen goods) may, inſtead of being whipped and burnt in the hand, be tranſported for ſeven years.

May be fined or whipt.

3. And by the 19 G. 3. c. 74. When any perſon ſhall be convicted of any felony within the benefit of clergy, for which he ſhall be liable to be burned in the hand, the court may, if they think fit, inſtead thereof, impoſe upon the offender a moderate pecuniary fine; or otherwiſe, inſtead of ſuch burning, in any of the caſes aforeſaid, except manſlaughter, may order the offender to be once or oftener, but not more than thrice, either publickly or privately whipped, ſuch private whipping to be in the preſence of not leſs than two perſons, beſides the offender and the * officer who inflicts the ſame; and in caſe of female offenders, in the preſence of females only. ſ. 3. * 358

Provided, that this ſhall not extend to deprive the court of the power now veſted in them, of detaining ſuch offender in priſon for

any time not exceeding one year, or of committing him to the houſe of correction or other publick workhouſe, to be kept to hard labour for any time not leſs than ſix months, nor exceeding two years: but ſuch perſon, after ſuch burning, or after ſuch whipping or fine, may be ſo detained or committed, and with ſuch accumulated puniſhment, in caſe of eſcape from ſuch houſe of correction or workhouſe, as if this act had not been made. ſ. 4.

Shall forfeit their goods.

4. A perſon admitted to his clergy forfeits all his goods that he hath at the time of the conviction. 2 H. H. 388.

But not lands.

5. But preſently upon his burning in the hand, he ought to be reſtored to the poſſeſſion of his lands, and from thenceforth to enjoy the profits thereof. 2 H. H. 388.

Credit reſtored.

6. Alſo it reſtores him to his credit; and conſequently enables him to be a good witneſs. 2 *Haw.* 364.

Actionable to call him felon.

7. And it is holden that after a man is admitted to his clergy, it is actionable to call him felon; becauſe his offence being pardoned by the ſtatute, all the infamy and other conſequences of it are diſcharged. 2 *Haw.* 365.

CLERK OF THE PEACE.

Who ſhall appoint.

THE *cuſtos rotulorum* ſhall appoint an able and ſufficient perſon, reſiding in the county or diviſion, to execute the office of clerk of the peace, by himſelf or his ſufficient deputy (to be allowed of by the ſaid *cuſtos rotulorum*, 37 H. 8. c. 1.); and to take and receive the fees, profits, and perquiſites thereof, for ſo long time only as ſuch clerk of the peace ſhall well demean himſelf in his ſaid office. 1 W. c. 21. ſ. 5.

Office not to be ſold.

2. But the *cuſtos rotulorum* ſhall not ſell the place of clerk of the peace, or take any bond or other aſſurance to receive any reward, fee, or profit, directly or indirectly, to him or to any other perſon for ſuch appointment; on pain that ſuch *cuſtos rotulorum* ſelling, and ſuch clerk of the peace buying, ſhall be diſabled to hold their
*359 reſpective * places, and ſhall each forfeit double value of the thing given to him who ſhall ſue. 1 W. c. 21. ſ. 8.

3. And

3. And every clerk of the peace, before he enters upon the execution of his office, ſhall in open ſeſſions take the oath following: *Oath.*

"I *A. B.* do ſwear, that I have not, nor will pay any ſum or "ſums of money, or other reward whatſoever, nor give any "bond or other aſſurance to pay any money, fee, or profit, di- "rectly or indirectly, to any perſon or perſons whomſoever, for "ſuch nomination and appointment: ſo help me God." 1 W. c. 21. ſ. 9.

4. He ſhall moreover take the oaths of allegiance, ſupremacy, and abjuration, and perform the other requiſites, as other perſons who qualify for offices. *Qualifying.*

5. No clerk of the peace, or his deputy, ſhall act as ſolicitor, attorney, or agent, or ſue out any proceſs at any general or quarter ſeſſions, where he ſhall execute the office of clerk of the peace or deputy; on pain of 50l, to him who ſhall ſue in twelve months, with treble coſts. 22 G. 2. c. 46. ſ. 14. *Not to act as ſolicitor.*

6. The clerk of the peace ſhall certify into the king's bench, the names of ſuch as be outlawed, attainted, or convicted of felony. 34 & 35 H. 8. c. 14. *Shall certify outlawries.*

7. He ſhall deliver to the ſheriff, within twenty days after *Sept.* 29, yearly, a perfect eſtreat or ſchedule of all fines and other forfeitures in ſeſſions. 22 & 23 C. 2. c. 22. ſ. 7. *Shall deliver eſtreats to the ſheriff.*

8. And ſhall alſo yearly, on or before the ſecond *Monday* after the morrow of All Souls, deliver into the court of exchequer a perfect duplicate, certificate, and eſtreat of all ſuch eſtreats and ſchedules delivered to the ſheriffs; on pain of 50l, half to the king, and half to him that ſhall ſue. 22 & 23 C. 2. c. 22. ſ. 8. And moreover he may be amerced for the ſame, by the barons of the exchequer. 3 G. c. 15. *Shall deliver eſtreats into the exchequer.*

9. And he ſhall, upon delivery of the ſaid eſtreats into the court of exchequer, take the following oath, to be adminiſtered by one of the barons; *Upon oath.*

"You ſhall ſwear, that theſe eſtreats, now by you delivered, "are truly and carefully made up and examined, and that all "fines, iſſues, amerciaments, recognizances, and forfeitures, "which were ſet, loſt, impoſed, or forfeited, and in right and due "courſe of law ought to be eſtreated into the court of exchequer, "are, to the beſt of your knowledge and underſtanding, therein "contained; * and that in the ſame eſtreats are alſo contained and *360
"expreſſed, all ſuch fines as have been paid into the court, from "which

"which the said estreats are made, without any wilful or fraudu-
"lent discharge, omission, misnomer, or defect whatsoever." 4 & 5 W. c. 24. s. 5.

Penalty of concealing fines.

10. And if he shall spare, take off, discharge, or conceal any such fine or forfeiture, unless it be by rule of court, he shall forfeit treble value, half to the king, and half to him that shall sue; and shall also forfeit his office, and be incapable to be employed in any office where the revenue is concerned. 22 & 23 C. 2. c. 22. s. 9.

Fees.

11. The clerk of the peace is not bound to enter judgment, or the like, at the suit of any, without having the fee due for the same; but if the court order any thing without suit of another, to wit, *ex officio*, there he ought to enter the same without having any fee for the entering thereof. *Crom.* 159.

Also Mr. *Crompton* says, he shall have for every recognizance of the peace taken in court 2s, and for every release of the peace there 2s, and for process awarded against any to find surety of the peace 2s. *Crom.* 160.

And by 10 & 11 W. c. 23. he shall have only 2s for drawing an indictment of felony; and if it is defective he shall draw a new one *gratis*, on pain of 5l with full costs to him that shall sue. s. 7, 8.

His fees also in divers other cases are specially limited by act of parliament: and it seemeth to be one of the *desiderata* in the justices law, that the clerk of the peace's fees are not ascertained in all instances, even as those of the other clerks to justices of the peace by the statute of the 26 G. 2. c. 14. And withal it might be requisite to insert in the table to be agreed on for that purpose, by whom the same shall be paid in the several instances respectively, and what shall be the course of recovering the same on non-payment.

May be displaced for misbehaviour.

12. If any clerk of the peace shall misdemean himself in the execution of his office, and thereupon a complaint and charge in writing of such misdemeanor shall be exhibited against him, to the justices in sessions, the said justices may, on examination and due proof thereof openly in the said sessions, suspend or discharge him from the said office; and in such case, the *custos rotulorum* shall appoint another able and sufficient person, residing in the said county or division, to be clerk of the peace. And in case of refusal or neglect to make such appointment, before the next general quarter sessions, the justices in sessions may appoint one. 1 W. c. 21. s. 6.

361 * His duty in other matters is interspersed where it falls in amongst the other titles of this book.

Appointment of a clerk of the peace; on the 37 *H. 8. c.* 1. and 1 *W. c.* 21.

FOrasmuch as the office of clerk of the peace for the county of ——— is now void by the death of ——— gentleman, late clerk of the peace for the ſaid county; Know all men by theſe preſents, that I ——— custos rotulorum *of the county aforeſaid, do hereby nominate, elect, appoint and aſſign* C. P. *gentleman, an able and ſufficient perſon, inſtructed and learned in the laws of* England, *and reſiding in the ſaid county, to be clerk of the peace for the ſaid county; to hold, execute, and enjoy the office of clerk of the peace for the county aforeſaid by himſelf or his ſufficient deputy; and to take and receive the fees, profits and perquiſites thereof, ſo long as he ſhall well, juſtly, and honeſtly demean himſelf in his ſaid office. In witneſs whereof I the ſaid ——— have hereunto ſet my hand and ſeal, the ——— day of ——— in the ——— year* ———.

Clipping Money. See *Coin.*
Clockmaking. See *Servants.*
Cloth and Clothier. See *Woollen Manufacture.*

COACHES.

To be under the management of the commiſſioners of the window duties.

BY the 25 G. 3. c. 47. The commiſſioners for the duties on houſes and windows, ſhall be commiſſioners for the duties on coaches, carriages, and horſes; and the duties thereupon are to be aſſeſſed, collected, received, and paid, by ſuch perſons, and in like form and manner, and with ſuch allowances, and under ſuch penalties, forfeitures, and diſabilities, and according to ſuch rules and directions, as are appointed for raiſing the duties on houſes and windows; and all powers and authorities, clauſes and things, now in force relating thereto, ſhall be in full force in the execution of this act, unleſs altered thereby. ſ. 7, 11.

Coaches, &c. with 4 wheels to pay 7l. per annum.

And for every coach, berlin, landau, chariot, calaſh, with *four wheels*, chaiſe-marine, chaiſe with *four wheels*, and caravan, or by what names ſoever ſuch carriages now are or hereafter may be called, kept by any perſon for his own * uſe, or to be

be let out for hire (except licenſed hackney coaches), ſhall be paid 7l. yearly. And for every calaſh, chaiſe, or chair, with *two* or *three* wheels, or by what name ſoever ſuch carriages are or may be called, drawn by one or more horſes, kept by any perſon for his own uſe, or to be let out for hire, ſhall be paid 3l. 10s. yearly. ſ. 2.

with 2 or 3 wheels, 3l. 10s. per annum.

Commiſſioners oaths.

And no commiſſioner ſhall act until he hath taken the oaths requiſite to qualify him as a commiſſioner of the window duties, and alſo the following oath, to be adminiſtered by two commiſſioners.

I A. B. *do ſwear, that I will truly and faithfully execute the office of a commiſſioner, according to an act made in the 25th year of the reign of king* George *the Third*, for transferring the receipt and management of certain duties therein mentioned, from the commiſſioners of exciſe and commiſſioners of ſtamps reſpectively, to the commiſſioners for the affairs of taxes; and alſo for making further proviſions in reſpect to the ſaid duties ſo transferred: *and will determine, without favour or affection, upon all appeals that ſhall be brought before me under the ſaid act, according to the beſt of my ſkill and knowledge. So help me God.*

And if any perſon ſhall act as a commiſſioner (except in adminiſtering the ſaid oaths) before he ſhall have taken ſuch oaths as aforeſaid, he ſhall forfeit 100l. ſ. 13.

Appointment of aſſeſſors.

And the commiſſioners in their precepts for naming aſſeſſors for the window duties, ſhall give notice that ſuch perſons are alſo appointed aſſeſſors for the duty on coaches. ſ. 19.

Oath to be taken by aſſeſſors, ſurveyors, and inſpectors.

And every aſſeſſor, ſurveyor, or inſpector, ſhall take the following oath, to be adminiſtered by two commiſſioners.

I A. B. *do ſwear*, [or affirm] *that in making the aſſeſſment, which by authority of an act made in the 25th year of the reign of king* George *the Third*, for transferring the receipt and management of certain duties therein mentioned, from the commiſſioners of exciſe and commiſſioners of ſtamps reſpectively, to the commiſſioners for the affairs of taxes: *I will charge all perſons according to the beſt of my ſkill and knowledge. So help me God.*

And if any ſuch perſon ſhall preſume to act before he ſhall have taken ſuch oath, he ſhall forfeit 20l. ſ. 18.

And

And such assessors shall, within 14 days after their appointment, give or leave at the dwelling house of every person within his limits, keeping any such carriages as aforesaid, or any waggon, wain, cart, or horse, liable to the said duties, notice in writing, requiring them to produce within 14 days next ensuing, lists in writing of the number * of carriages liable to the said duties kept and used by him within such limit; the said lists to describe the greatest number of such carriages kept at any one time in the course of the year ending on the 5th day of April preceding such notice, and to express the denomination of each carriage, and its number of wheels, distinguishing which are kept for private use, and which for hire, and which are used as publick stage coaches; and another list in writing of the number of horses liable to the said duties on horses, kept and used by him within such limits, such list to contain the greatest number by him kept and used in the course of the year ending on such preceding 5th day of April as aforesaid; and every person shall, after such notice so given or left, make out the said lists accordingly, and sign the same with his own hand, and deliver them to such assessor, at any time within 14 days from such notice, when he shall call for the same. And if any such person shall neglect or refuse to make out, sign, and deliver such lists within the time before mentioned, he shall forfeit 10l; and such assessor shall, from the best information he can obtain, make an assessment upon such person of the number of carriages and horses liable to the said duties so kept by him, distinguishing them in manner as aforesaid; and such assessment shall be final and conclusive upon the person thereby charged, who shall not be at liberty to appeal therefrom unless such person shall prove that he was not at his dwelling house at the time of the delivery of such notice, nor between that day and the time limited for delivering such lists to the assessor; or unless such person shall alledge and prove such other excuse for not having delivered the same, as the said commissioners shall think reasonable and sufficient. s. 20, 27.

Notice to be given to persons keeping carriages or horses, to deliver lists thereof.

who shall deliver such lists on pain of 10l.

If no list is delivered, the assessor to make an assessment, which shall not be appealed against.

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Nevertheless, such assessors shall not be bound by such lists so delivered to them as aforesaid, but shall be at liberty, if they find any carriages or horses omitted in such lists, to surcharge the same, and make a true assessment upon every person keeping such carriages or horses within their respective districts, of the real number of carriages or horses kept by each such person. s. 24.

Assessors are are not bound by such lists.

And if any assessor, surveyor, or inspector, shall make a surcharge in respect of any carriage or horse omitted in such list, such surcharge shall be made after the rate of double the duty so omitted;

Carriages omitted, to pay double duty.

one half whereof ſhall go to ſuch perſon making ſuch ſurcharge. ſ. 28.

Where no aſſeſſors are appointed or neglect their duty.

And if at any time there ſhall be a neglect of appointment of aſſeſſors, or if they ſhall neglect what is required of them by this act, the ſurveyor or inſpector of the duties on houſes and windows, is authorized and required to do * and perform ſuch and the like ſervices as are required from ſuch aſſeſſors. ſ. 17.

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Carriages or horſes kept in different diſtricts.

And to the end that no perſon may pay the ſaid duties in more diſtricts than one within the ſame year, every perſon who ſhall mean to pay for any carriage or horſe in another diſtrict, ſhall ſpecify in a liſt or declaration the particular pariſh or diſtrict wherein he means to pay for ſuch carriage or horſe; and the ſaid aſſeſſors ſhall enter the ſaid laſt mentioned liſt at the end of their ſeveral aſſeſſments, and ſhall deliver the ſame to the ſurveyor of ſuch diſtrict, in order that he may tranſmit the ſame to the commiſſioners of taxes. And if any perſon, having been aſſeſſed in one diſtrict, ſhall again be aſſeſſed in another for the ſame carriage or horſe, the commiſſioners within ſuch latter diſtrict, on application for that purpoſe, are required to alter ſuch aſſeſſment, on proof being given that ſuch perſon hath paid the duty in another place. ſ. 22, 23.

Lodgers or inmates.

And whereas difficulties may ariſe in diſcovering lodgers or inmates in any houſe, who keep carriages or horſes liable to the ſaid duties; it is therefore enacted, that the inhabitant houſholder of any houſe in which there ſhall be any lodger or inmate as aforeſaid, ſhall, within a week after he ſhall be required by notice in writing left at his houſe by any aſſeſſor, ſurveyor, or inſpector, deliver to, or leave for ſuch aſſeſſor, a liſt in writing of every ſuch lodger or inmate who ſhall keep any carriage or horſe liable to the ſaid duties, containing his chriſtian and ſurname, and an account of every ſuch carriage or horſe to the beſt of his knowledge; and if he ſhall refuſe to deliver ſuch liſt, or wilfully omit or miſrepreſent any deſcription which ought to be contained therein, he ſhall forfeit 20l. ſ. 29.

Aſſeſſors to deliver their aſſeſſments in 3 months.

And ſuch aſſeſſors ſhall make and deliver in writing ſuch aſſeſſments within their reſpective limits to the ſaid commiſſioners, within three months next after the time of their ſo being appointed aſſeſſors; and two of the ſaid commiſſioners ſhall, within one month next after, or as ſoon after as conveniently may be, ſign ſuch aſſeſſments, and alſo ſuch ſurcharge as ſhall have been made in the mean time, teſtifying their allowance of the ſame; and ſhall appoint two of the perſons named in ſuch aſſeſſment to be collectors, or any other two ſuch perſons as they ſhall think able and reſponſible; and ſhall deliver ſuch aſ-

Collectors to be appointed.

ſeſſments

ſeſſments unto the ſaid collectors, who are required to collect the ſaid duties ſo aſſeſſed, and to give acquittances for the ſame, and for the payment thereof to the receiver general, the pariſh or place for which they are ſo appointed ſhall be anſwerable. ſ. 25. *365

Surveyors, &c. may inſpect liſts.

And ſuch ſurveyor or inſpector may inſpect any ſuch liſts and aſſeſſments before the ſame be ſigned, and alter and amend the ſame if they ſhall ſee juſt cauſe; and thoſe perſons in whoſe cuſtody ſuch liſts and aſſeſſments ſhall be, are required, upon the requeſt of ſuch ſurveyor or inſpector, to produce the ſame; and if ſuch ſurveyor or inſpector ſhall, upon his ſurvey, diſcover that any perſon who ought to have been charged with the ſaid duties, ſhall have been omitted or under-rated, he ſhall certify the ſame in writing under his hand, together with an account of every ſuch carriage or horſe ſo omitted, by way of ſurcharge, to two commiſſioners, in order to have the ſame rectified in the ſaid aſſeſſment, and to cauſe the duties to be levied accordingly. ſ. 26.

Penalty of a falſe ſurcharge.

Provided always, that if upon appeal it ſhall appear, that ſuch ſurcharge was falſly and vexatiouſly made, ſuch ſurveyor, aſſeſſor, or inſpector, ſo ſurcharging, ſhall forfeit and incur ſuch penalties and puniſhments, as in and by the ſaid acts relating to the duties on houſes and windows, are inflicted on ſuch perſons for neglect of duty. ſ. 32.

Appeal.

If any perſon ſhall think himſelf over-rated by any aſſeſſment, charge, or ſurcharge, he may, giving ten days notice thereof to the ſurveyor or one aſſeſſor, appeal to the ſaid commiſſioners or any two of them, who are to hear and determine the ſame; except ſuch perſon appealing ſhall have omitted to deliver ſuch liſt as aforeſaid, and ſhall not aſſign ſufficient cauſe for ſuch omiſſion, in which caſe the ſaid commiſſioners may diſmiſs the appeal; provided that at the time of hearing ſuch appeal, a liſt ſhall be produced upon the oath of the appellant, containing the greateſt number of carriages and horſes ſubject to the ſaid duty, which have been kept by him within the diſtrict within the year preceding, with ſuch deſcription as to other diſtricts as aforeſaid; and ſuch appeals ſhall be heard on the days appointed for hearing appeals reſpecting the duties on houſes and windows; and the commiſſioners ſhall not make any abatement in ſuch charge or ſurcharge, unleſs it ſhall appear upon oath that ſuch perſon is over-rated; nevertheleſs they may ſtrike off the penalty, on application of ſuch appellant, although they confirm the ſurcharge, if it ſhall appear there was any doubt whether ſuch carriage or horſe was chargeable or not, and was not omitted out of ſuch liſt with any intention to defraud the revenue. ſ. 30, 31.

Appeals once determined, to be final.

And all appeals once heard and determined by two commiſſioners, on the days appointed for hearing appeals, ſhall be final and concluſive; ſubject nevertheleſs, if any perſon * is diſſatisfied, to *366

an appeal to the judges, in the ſame manner as for the duties on houſes and windows. ſ. 33, 34.

Penalties, how to be recovered.

All penalties above 20l are to be recovered in the courts at *Weſtminſter*, but penalties not exceeding 20l may be recovered before two juſtices, on confeſſion, or oath of one witneſs, by diſtreſs, half to the king, and half to the perſon who ſhall inform and ſue for the ſame; and for want of ſufficient diſtreſs, the offender ſhall be ſent to priſon, for any time not exceeding ſix months, nor leſs than one month. ſ. 36, 39.

Conſtables to be aiding and aſſiſting.

All conſtables are to be aiding and aſſiſting in the execution of this act, and are to obey and execute ſuch precepts as ſhall be to them directed by the ſaid commiſſioners. ſ. 40.

COACHES. Duty on new carriages. See *Exciſe.*

COACH-MAKERS. See *Exciſe.*

COALS.

BY the 30 C. 2. ſt. 1. c. 8. and 6 & 7 W. c. 10. and 11 G. 2. c. 15. for the admeaſurement of keels, boats, waggons, wains, carts, and other carriages, uſed for the carrying of coals in the ports of *Newcaſtle*, *Sunderland*, and the other members of the port of *Newcaſtle*; and by the 15 G. 3. c. 27. for extending the like regulations to the other ports of this kingdom: If, after the admeaſurement thereof by the commiſſioners appointed for that purpoſe, the marks ſhall be removed or altered; every perſon who had a hand in or was privy to the doing thereof, ſhall on conviction upon the oath of one witneſs before one juſtice, forfeit 10l by diſtreſs, half to the king and half to the diſcoverer; and for want of diſtreſs, ſhall be committed to the common gaol for three months.

Concerning the weights, meaſures, and prices of coals, eſpecially in and about *London*, and alſo concerning the duties thereupon, there are regulations made by above forty different acts of parliament; which, not being of general concern, are here omitted.

By 26 G. 3. c. 14. ſ. 2. the coal-meters are ſubjected to the juriſdiction of the quarter ſeſſions for *Surry*.

*307 * By ſ. 27. Penalties not exceeding 5l are recoverable before one or more juſtices of the peace for *Surry*.

By c. 83. ſ. 7. Juriſdiction is given to the juſtices of *London* and *Middleſex*, as to ſacks of leſs dimenſions than preſcribed by the act, and as to ſhort meaſure.

And by c. 108. ſ. 2. Juſtices are empowered to examine witneſſes on oath or affirmation.

For the deſtroying of coal works. See *Mines.*
Cocoa nuts. See *Exciſe.*
Coffee. See *Exciſe.*

C O I N.

For matters common to this with other treaſons, ſee title *Treaſon.*

1. *COIN*, in French, ſignifieth a corner, and from thence hath its name (according to Lord *Coke*) becauſe in ancient times money was ſquare, with corners, as it is in ſome countries to this day. 1 Inſt. 207. *Original of the word.*

Others derive this word, which in the old *French* is written *coign*; as alſo the Italian *cunio*, and the Spaniſh *cuño*, from the Greek word κοινος, *communis*; becauſe money is the common mean or inſtrument of traffick.

But theſe derivations ſeem too artificial. The word doth properly ſignify a wedge, as the Latin *cuneus*; and hath a verb belonging to it in the ſeveral languages: and is tranſlated to lawful money; either from the form of a wedge, ingot, or lingot (*linguetta*) in which bullion was tranſported from all antiquity; or elſe from the inſtrument, a wedge or chiſſel, with which, in trade, theſe lingots were occaſionally cut to the weight required, as they are at this day in the *Eaſt Indies*, with ſheers.

2. No other weight, than ſuch as ſhall be ſtamped or marked by the officer appointed by his majeſty for that purpoſe, ſhall be ſufficient in law for determining the weight of the gold and ſilver coin. And if any perſon ſhall counterfeit ſuch ſtamp or mark, or knowingly ſell any weight with the impreſſion of ſuch counterfeit ſtamp thereon; or ſhall wilfully increaſe or diminiſh any ſuch weight after it * has been ſo ſtamped or marked; or uſe any ſuch weight in weighing the gold and ſilver coin of this realm, knowing the ſame to be ſo increaſed or diminiſhed: he ſhall, on conviction before two juſtices, forfeit any ſum not exceeding 50l, half to the king, and half to him that ſhall inform or ſue; and in default of payment, he *Weights for coin.* *368

he ſhall be committed to the common gaol or houſe of correction for any time not exceeding three months. 14 G. 3. c. 92.

Denominating the value of coin.

3. The legitimation of money, and the giving it its denominated value, is one ſpecial part of the king's prerogative. 1 H. H. 188.

But in order to fix the value, the weight and fineneſs of the metal are to be taken into conſideration: When a given weight of gold and ſilver is of a given fineneſs, it is then of the true ſtandard, and called Sterling metal, and of this ſterling metal all the coin of the kingdom muſt be made by the ſtatute of 25 Ed. 3. ſt. 5. c. 13. So that the king's prerogative ſeemeth not to extend to the debaſing or enhancing the value of the coin below or above the ſterling value. 1 *Blackſt.* 278.

Legitimating foreign coin.

4. And the king may by his proclamation legitimate foreign coin, and make it current money of this kingdom, according to the value impoſed by ſuch proclamation. 1 H. H. 192.

And therefore both *Engliſh* money, coined by the king's authority, and foreign coin made current by proclamation, are within the denomination of lawful money of *England*. 1 Inſt. 207.

But of this latter ſort there is none at preſent in *England*; *Portugal* money being only taken by conſent, as approaching neareſt to our ſtandard, and falling in tolerably well with our diviſions of money into pounds and ſhillings, but no perſon is obliged to take it. 4 *Blackſt.* 89.

Copper coin.

5. And only gold or ſilver coin, and not braſs or copper, are within this denomination. 1 *Haw.* 42.

And no perſon can be inforced to take in payment any money but of lawful metal, that is of ſilver or gold. 2 Inſt. 577. Except for ſums under ſixpence. 1 H. H. 195.

Counterfeiting the coin of this realm.

6. By the ſtatute 25 Ed. 3. ſt. 5. c. 2. it is made treaſon to counterfeit the coin of this realm: That is to ſay, whether the perſon utter it or not. 3 Inſt. 16. 1 *Haw.* 42.

Counterfeiting foreign current coin.

7. And if any perſon ſhall falſely forge and counterfeit any ſuch kind of coin of gold or ſilver, as is not the proper coin of this realm, and ſhall be current therein by the king's conſent; he,
*369 his counſellors, procurers, aiders, * and abettors, ſhall be guilty of high treaſon. 1 *Mar.* ſeſſ. 2. c. 6.

Clipping, waſhing, filing.

8. By the 5 El. c. 11. Clipping, waſhing, rounding, or filing, for lucre or gain, any the proper coin of this realm, or the dominions thereof, or of any other realm current within this realm by proclamation, ſhall be adjudged treaſon in the offenders, their counſellors, conſenters and aiders.

9. And

9. And by the 18 El. c. 1. If any perſon ſhall, for lucre or gain, by any art, ways, or means, impair, diminiſh, falſify, ſcale, or lighten, the proper coin of this realm, or any the dominions thereof, or the coin of this realm allowed to be current (at the time of the offence committed) by the king's proclamation; he, his counſellors, conſenters, and aiders, ſhall be guilty of treaſon. *Impairing, diminiſhing, falſifying.*

10. And if any perſon (not employed in the mint) ſhall mark on the edges any the current coin of this kingdom; or, if any perſon whatſoever ſhall mark on the edges any of the diminiſhed coin of this kingdom, or any counterfeit coin reſembling the coin of this kingdom, with letters or grainings, or other marks or figures like unto thoſe on the edges of money coined in the mint; he, his counſellors, procurers, aiders, and abettors, ſhall be guilty of high treaſon. 8 & 9 W. c. 26. ſ. 3. Proſecution to be in ſix months. 1 An. ſt. 1. c. 9. *Edging.*

11. Alſo, if any perſon ſhall colour, gild, or caſe over with gold or ſilver, or with any waſh or materials producing the colour of gold or ſilver, any coin reſembling any the current coin of this kingdom, or any round blanks of baſe metal, or of coarſe gold or coarſe ſilver, of a fit ſize and figure to be coined into counterfeit milled money, reſembling any the gold or ſilver coin of this kingdom; or if any perſon ſhall gild over any ſilver blanks of a fit ſize and figure to be coined into pieces reſembling the current gold coin of this kingdom; he, his counſellors, procurers, aiders, and abettors, ſhall be guilty of high treaſon. 8 & 9 W. c. 26. ſ. 4. Proſecution to be in three months. ſ. 9. *Colouring.*

And by the 15 & 16 G. 2. c. 28. If any perſon ſhall waſh, gild, or colour any lawful or counterfeit ſilver coin called a ſhilling or ſixpence, or add to or alter the impreſſion, or any part thereof, on either ſide, with intent to make ſuch ſhilling or ſixpence reſemble a guinea or half guinea; or ſhall any way alter or colour halfpennies or farthings, with intent to make them reſemble a ſhilling or ſixpence: he, his counſellors, aiders, and abettors, ſhall be guilty of high treaſon. Proſecution to be in ſix months.

* 12. Lord *Hale*, ſpeaking of copper halfpence and farthings, makes it a quæry, whether the counterfeiting of them be not treaſon within the ſtatute of 25 Ed. 3. but inclines to the negative. 1 H. H. 195, 211, 212. *Counterfeiting halfpence and farthings.* *370

And with this agrees the ſenſe of the legiſlature, in the ſtatute of 15 & 16 G. 2. c. 28. which reciting, that whereas the counterfeiting of the copper coin of this kingdom is only a miſdemeanor, and the puniſhment often very ſmall, therefore enacteth, that if any perſon ſhall coin or counterfeit braſs or copper halfpence or farthings; he, his counſellors, aiders, and abettors, ſhall ſuffer two years

years impriſonment, and find ſureties for their good behaviour for two years more. ſ. 6.

And further, by the 11 G. 3. c. 40. If any perſon ſhall make, coin, or counterfeit, any of the copper monies of this realm, commonly called an halfpenny or farthing; or ſhall buy, ſell, take, receive, pay, or put off any counterfeit copper money, not melted down or cut in pieces, at or for a lower rate or value than by its denomination it doth import or was counterfeited for; he ſhall be guilty of felony [but within clergy]. And one juſtice, on complaint upon oath that there is juſt cauſe to ſuſpect, that any perſon hath been concerned in counterfeiting the copper monies of this realm, may by his warrant cauſe the dwelling houſe, room, workſhop, out-houſe, yard, garden, or other place, belonging to ſuch ſuſpected perſon, to be ſearched for tools and implements for coining ſuch copper monies: And if any ſuch tools or implements ſhall at any time be found hid or concealed in any place ſo ſearched, or be found in the cuſtody of any perſon whatſoever not employed in his majeſty's mint, nor having the ſame by ſome lawful authority; it ſhall be lawful for any perſon whatſoever diſcovering the ſame, to ſeize ſuch tools or implements, and carry the ſame forthwith to a juſtice, who ſhall cauſe the ſame to be ſecured and produced in evidence againſt any perſon who ſhall be proſecuted for any the offences aforeſaid, in ſome court proper for the determination thereof; and after they ſhall have been produced in evidence, as well the ſame ſo produced, as the other ſo ſeized and not produced in evidence, ſhall forthwith, by order of the court, or by order of a juſtice, if there ſhall be no trial, be defaced and deſtroyed, or otherwiſe diſpoſed of as ſuch court or juſtice ſhall direct.

Counterfeiting coin not current.

13. If any perſon ſhall falſely forge or counterfeit any ſuch kind of coin of gold or ſilver, as is not the proper coin of this realm, nor permitted to be current within this * realm; he, his procurers, aiders, and abettors ſhall be guilty of miſpriſion of high treaſon. 14 El. c. 3.

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Bringing in falſe money.

14. If any perſon ſhall bring falſe money into the realm, counterfeit to the money of *England*, knowing the ſame to be falſe, to merchandiſe or make payment, in deceit of the king and his people; he ſhall be guilty of high treaſon. 25 Ed. 3. ſt. 5. c. 2.

Alſo, if any perſon ſhall bring from the parts beyond the ſea, any forged and counterfeit money like to the gold or ſilver coin of foreign realms, current in payment within the king's realm by the king's ſufferance and conſent, knowing the ſame to be falſe and counterfeit, to the intent to utter or make payment of the ſame within this realm, by merchandizing or otherwiſe; he, his counſellors, procurers, aiders, and abettors ſhall be guilty of high treaſon. 1 & 2 P. & M. c. 11. ſ. 2.

Note; this muſt be brought from a foreign nation, and not from *Ireland*, or other place ſubject to the crown of *England*; becauſe the

the counterfeiting there, is puniſhable by the laws of our king, as much as in *England*. 1 Haw. 43.

Sir *Michael Foſter* obſerving upon theſe offences (and of the offence above mentioned, of counterfeiting foreign current coin) ſays, proſecutions for importing money counterfeit to the ſimilitude of *Engliſh* coin have been very rare; and for the offences of counterfeiting foreign coin legitimated by proclamation, and of importing ſuch coin, there can be none, as things ſtand at preſent, till the crown ſhall be adviſed to legitimate ſome ſpecies of foreign coin. I know of none (ſays he) now current among us that is legitimated, and moſt probably none will. For if the offences of counterfeiting and diminiſhing foreign coin, and of importing ſuch counterfeit and diminiſhed coin, which are great evils and daily growing, were made more penal than they are at preſent, he ſays he knows of no good end that could be anſwered by legitimating any ſpecies of it; on the other hand, there ſeem to be great inconveniencies that would attend it. *Foſt.* 227.

Bringing in light money.

15. By the 14 G. 3. c. 42. (which by the 18 G. 3. c. 45. hath continuance to *May* 1, 1783, &c.) all ſilver coin of this realm, or purporting ſo to be, which is not of the eſtabliſhed ſtandard of the mint in weight and fineneſs, that is, of 62 ſhillings to a pound troy, and 11 ounces and 2 penny weights of fine ſilver, and 18 penny weights of alloy in the pound troy, ſhall be prohibited to be imported; and if any quantity thereof exceeding 5l. ſhall be found by any officer of the cuſtoms, the ſame ſhall be * forfeited, and * 372
proſecuted in any court of record at *Weſtminſter*; or if it do not amount in value to 10l, the ſame may be proſecuted in a ſummary way before two juſtices where the ſeizure ſhall be made, at the election of the commiſſioners of the cuſtoms: And after condemnation the ſame ſhall be melted down or otherwiſe defaced, and ſhall be half to the king and half to the officer who ſhall proſecute.

And no tender in the payment of money in ſilver coin of any ſum above 25l, at any one time, ſhall be allowed to be legal, for more than according to its value by weight, after the rate of 5s 2d an ounce.

Coining preſs and tools.

16. If any preſs for coinage, ſhall be found in the cuſtody of any perſon (other than the officers of the mint), it ſhall be ſeized for the king's uſe; and every perſon in whoſe cuſtody ſuch preſs ſhall be found, ſhall forfeit 500l, half to the king, and half to the informer. 7 & 8 W. c. 19. ſ. 4.

And by 8 & 9 W. c. 26. No perſon, unleſs employed in the mint, ſhall knowingly make or mend, or begin or proceed to make or mend, or aſſiſt in the making or mending of any puncheon, counter-puncheon, matrix, ſtamp, dye, pattern or mould, of ſteel, iron, ſilver, or other metal, or of ſpaud, or fine founders earth, or ſand, or of any other materials whatſoever, in or upon which there

ſhall be, or be made or impreſſed, or which will make or impreſs the figure, ſtamp, or reſemblance of both or either of the ſides or flats of any gold or ſilver coin, current within this kingdom; nor ſhall knowingly make or mend, or begin or proceed to make or mend, or aſſiſt in the making or mending of any edger or edging tool, inſtrument, or engine, not of common uſe in any trade, but contrived for making of money round the edges with letters, grainings, or other marks or figures reſembling thoſe on the edges of money coined in the mint; nor any preſs for coinage; nor any cutting engine for cutting round blanks, by force of a ſcrew, out of flatted bars of gold, ſilver, or other metal; nor ſhall knowingly buy or ſell, hide or conceal, or without lawful authority or ſufficient excuſe for that purpoſe, knowingly have in his houſe, cuſtody, or poſſeſſion, any ſuch puncheon, counter-puncheon, matrix, ſtamp, dye, edger, cutting engine, or other tool or inſtrument before mentioned; on pain that ſuch perſon, his counſellors, procurers, aiders, and abettors, ſhall be guilty of high treaſon. ſ. 1. Proſecution to be in three months. ſ. 9. But by the 1 An. ſt. 1. c. 9. ſ. 2. The proſecution for offences by making or amending, or beginning or proceeding to make or mend any coining tool or * inſtrument in the aboveſaid
*373 act prohibited, or by making of money round the edges with letters or grainings, may be commenced at any time within ſix months.

And if any perſon ſhall, without lawful authority, knowingly convey, or aſſiſt in conveying out of the mint, any puncheon, counter-puncheon, matrix, dye, ſtamp, edger, preſs or other tool, engine, or inſtrument uſed for or about the coining of monies there, or any uſeful part of ſuch tool or inſtrument; he, his counſellors, procurers, aiders, or abettors, ſhall be guilty of high treaſon: 8 & 9 W. c. 26. ſ. 2. Proſecution to be in three months. ſ. 9.

And if any puncheon, dye, ſtamp, edger, cutting engine, preſs, flaſk, or other tool, inſtrument, or engine, uſed or deſigned for coining or counterfeiting gold or ſilver monies, or any part of ſuch tool or engine, ſhall be hid or concealed in any place, or found in the houſe, cuſtody, or poſſeſſion of any perſon not employed in the mint, nor having the ſame by ſome lawful authority; any perſon whatſoever diſcovering the ſame, may and ſhall ſeize the ſame, and carry them forthwith to ſome juſtice of the peace to be by him ſecured, to be produced in evidence, againſt any perſon who ſhall be proſecuted for any ſuch offence. And after they have been produced in evidence, they ſhall forthwith by order of the court (or by order and in the preſence of a juſtice of the peace, if there hath been no trial) be totally defaced and deſtroyed. 8 & 9 W. c. 26. ſ. 5.

Selling of clippings.

17. For the better preventing the clipping, diminiſhing, or impairing the current coin, if any perſon ſhall buy or ſell, and knowingly have in his cuſtody or poſſeſſion, any clippings or filings of the current coin of this kingdom; he ſhall forfeit the ſame, and alſo 500l, half to the king, and half to the informer; and ſhall be branded

branded in the right cheek with the letter R; and be impriſoned till the payment of the 500l. 6 & 7 W. c. 17. ſ. 4.

18. And if any ſhall caſt ingots or bars of ſilver, in imitation of *Spaniſh* bars or ingots, or ſtamp them in likeneſs of the *Spaniſh* ſtamp, he ſhall forfeit the ſame, and alſo 500l, half to the king, and half to the informer. 6 & 7 W. c. 17. ſ. 3. *Bullion.*

And if any broker, not being a trading goldſmith or refiner of ſilver, ſhall buy or ſell any bullion or molten ſilver, he ſhall be impriſoned ſix months. ſ. 7.

And the warden of the company of goldſmiths, with two of the court of aſſiſtants within the bills, and two juſtices elſewhere, may enter into the houſe, room, or workſhop of any perſon ſuſpected, and with the help of a * conſtable may break open any door, box, trunk, cheſt, cupboard, or cabinet, to ſearch for bullion ſuſpected to be concealed; and if found, they ſhall ſeize the ſame, and the perſon in whoſe poſſeſſion it ſhall be found. And the ſaid wardens, aſſiſtants, and conſtables, within the bills, ſhall carry him before the next juſtice, which juſtice, and the ſaid two juſtices elſewhere, may examine him; and if he ſhall not prove by the oath of himſelf, or of a credible witneſs, that it is lawful ſilver, and was not current coin, nor clippings thereof, he ſhall be committed; and if on his trial he ſhall not prove the ſame by one witneſs, he ſhall be impriſoned ſix months. ſ. 8. * 374

And no perſon ſhall ſhip any molten ſilver or bullion, without certificate from the court of the lord mayor and aldermen of *London*, and oath made before them by the owner and two witneſſes, that it is foreign bullion, and that no part of it was the coin of this realm, or clippings thereof, nor plate wrought within this kingdom; on pain that the ſame ſhall be forfeited, half to the king, and half to the officer or other perſon who ſhall ſeize the ſame. And the owner ſhall forfeit double the value thereof, half to the king, and half (with coſts) to him that ſhall ſue. And the captain or maſter of a ſhip (if it belong to a ſubject) permitting the ſame, ſhall forfeit 200l, to him who ſhall ſue; and if it is a king's ſhip, he ſhall moreover forfeit his employment. And if any officer of the cuſtoms ſhall grant a cocquet for exporting the ſame, before ſuch certificate and entry thereof made; he ſhall forfeit 200l, and his office. And in caſe of ſeizure of ſuch bullion, or action brought for the forfeitures, the proof ſhall lie upon the owner; and for want of proof it ſhall be forfeited. 7 & 8 W. c. 19. ſ. 6, 7, 8, 9.

And if any bullion is entred to be exported, other than in the name of the true owner or importer; the exporter ſhall forfeit the ſame, or the value thereof; half to the king, and half to him who ſhall ſeize or diſcover the ſame. 6 & 7 W. c. 17. ſ. 14.

Blanched copper and other baſe metal.

19. And whereas ſeveral mixtures of metals have been invented in imitation of gold and ſilver, and blanched copper is principally made uſe of in imitation of ſilver, and ſeldom, if ever, for any honeſt or good purpoſe, it is enacted, that if any perſon ſhall blanch copper for ſale, or mix blanched copper with ſilver, or knowingly buy or ſell or offer to ſale blanched copper alone, or mixed with ſilver; or ſhall knowingly and fraudulently buy or ſell or offer to ſale any malleable compoſition or mixture of metals or minerals, which ſhall be heavier than ſilver,
*375 and look, and * touch, and wear like ſtandard gold, but be manifeſtly worſe than ſtandard; he ſhall be guilty of felony, and ſhall ſuffer death as in caſe of felony. Proſecution to be in three months. 8 & 9 W. c. 26. ſ. 6, 9.

Paying coin under value.

20. If any perſon ſhall take, receive, pay, or put off any counterfeit milled money, or any milled money whatſoever unlawfully diminiſhed, and not cut in pieces, at or for a lower rate or value than the ſame by its denomination doth or ſhall import, or was coined or counterfeited for; he ſhall be guilty of felony, and ſuffer death as in caſe of felony. Proſecution to be in three months. 8 & 9 W. c. 26. ſ. 6, 9.

Uttering falſe money.

21. If any perſon counterfeits, and by agreement before the counterfeiting, another perſon is to take off and vent the counterfeit money, ſuch other is an aider and abettor, and conſequently a principal traitor (for in high treaſon there are no acceſſaries) 1 H. H. 214.

If one perſon counterfeits, and another (knowing that he did ſo) puts it off, but without any ſuch previous agreement; ſuch other perſon ſeems to be all one with a receiver of him, becauſe he maintains him. 1 H. H. 214.

If one perſon counterfeits, and another perſon knows that he did ſo, and doth neither receive, maintain, or abet him, but conceals his knowledge; this is miſpriſion of treaſon. 1 H. H. 214.

But, formerly, where it did appear, that the utterer of counterfeit money knew who counterfeited it, but barely uttered it for his own benefit, although he knew it was counterfeit, yet it was only a cheat and miſdemeanor, puniſhable by fine and impriſonment (contrary to the opinion in *Stanford* and *Dalton*); but now by the ſtatute of 15 G. 2. c. 28. it is enacted, that whereas the uttering falſe money is a crime frequently committed all over the kingdom, and the offenders are not deterred, becauſe it is only a miſdemeanor, and the puniſhment generally ſmall, tho' there is reaſon to believe that the utterers are often the coiners, or in confederacy with them; therefore, if any perſon ſhall tender in payment any counterfeit coin, knowing it to be ſo, he ſhall for the firſt offence ſuffer ſix months impriſonment, and find ſureties for his good behaviour for ſix months longer; for the ſecond offence, ſhall ſuffer two years impriſonment,

impriſonment, and find ſureties for two years more; and for the third offence, ſhall be guilty of felony without benefit of clergy. ſ. 2.

And if any perſon ſhall tender in payment any counterfeit money (knowing it to be ſo), and ſhall either the * ſame day, or within ten days after, knowingly tender other falſe money in payment, or at the time of ſuch tendering have more in his cuſtody; he ſhall for the firſt offence ſuffer a year's impriſonment, and find ſureties for his good behaviour for two years more; and for the ſecond offence, ſhall be guilty of felony without benefit of clergy. ſ. 3. *376

Perſons guilty of the ſame crimes ſhall be tried and convicted in ſuch manner as is uſed againſt offenders for counterfeiting the coin: and the clerk of aſſize, or clerk of the peace, where the firſt conviction was had, ſhall certify the ſame by a tranſcript in few words, containing the tenor of ſuch conviction (for which he ſhall have 2s 6d): and ſuch certificate being produced in court, ſhall be ſufficient proof of the former conviction. Proſecution to be in ſix months. ſ. 5, 9.

Note; By this it ſhould ſeem, that the juſtices of the peace in ſeſſions have power to try ſuch offenders; otherwiſe this direction to the clerk of the peace to certify the conviction is incongruous; for he is not the proper perſon to certify what is done in another court, where he is not neceſſarily ſuppoſed to be preſent: albeit no power is given to the ſeſſions by any expreſs words in this ſtatute to hear and determine ſuch offences.

By the ſtatute 9 G. 3. c. 37. If any churchwarden or overſeer of the poor, or perſon authorized by him, ſhall make any payments to the poor in any baſe or counterfeit money; one juſtice, on complaint, may ſummon the offender, and on his non-appearance, or confeſſion, or proof of the offence by the oath of one witneſs, may adjudge him to forfeit not leſs than 10s, nor more than 20s, to be levied by diſtreſs, and to be applied to the uſe of any poor perſon or perſons of the pariſh or place reſpectively as the juſtice ſhall appoint. ſ. 7.

Having falſe money in poſſeſſion.

22. If falſe or clipt money be found in a man's hands if he be ſuſpicious, he may be arreſted till he have found his warrant. 3 Inſt. 18. *Hale's* Pl. 21. 1 *Haw.* 43.

Falſe money what to be done with.

23. Any perſon to whom any *ſilver* money ſhall be tendred, any piece whereof ſhall be diminiſhed, otherwiſe than by reaſonable wearing, or that by the ſtamp, impreſſion, colour, or weight thereof, he ſhall ſuſpect to be counterfeit, may cut, break, or deface ſuch piece: and if any piece ſo cut, broken, or defaced ſhall appear to be a counterfeit, the perſon tendring the ſame ſhall bear the loſs thereof; but if the ſame ſhall be of due weight, and appear to be lawful money, the perſon that cut, broke, or defaced the ſame, ſhall receive the ſame at the rate it was coined for. And if any queſtion ariſe, whether the piece * ſo cut be counterfeit, it ſhall *377

ſhall be determined by the next juſtice of the peace, or chief magiſtrate in a corporation. 9 & 10 W. c. 21. ſ. 1.

And if any perſon to whom any *gold* money ſhall be tendred, any piece or pieces whereof ſhall be diminiſhed otherwiſe than by reaſonable wearing; or that by the ſtamp, impreſſion, colour, or weight thereof, he ſhall ſuſpect to be counterfeit; may cut, break, or deface ſuch piece or pieces: And if any piece ſo cut, broken, or defaced ſhall appear to be diminiſhed otherwiſe than by reaſonable wearing, or counterfeit; the perſon tendring the ſame ſhall bear the loſs thereof: But if the ſame ſhall be of due weight, and appear to be lawful money; the perſon that cut, broke, or defaced the ſame, ſhall receive the ſame at the rate it was coined for. And if any queſtion ſhall ariſe, whether the piece ſo cut be counterfeit or diminiſhed in manner aforeſaid, it ſhall be determined by the mayor or other head officer in a corporation, and elſewhere by one juſtice inhabiting near where the tender was made. 13 G. 3. c. 71.

And if any counterfeit or unlawfully diminiſhed money ſhall be produced in any court of juſtice, either in evidence or otherwiſe, the judge ſhall cauſe it to be cut in pieces in open court, or in the preſence of a juſtice of the peace, and then to be delivered to or for the perſon to whom it belongs. 8 & 9 W. c. 26. ſ. 5.

Bail. 24. By the 3 Ed. 1. c. 15. Perſons taken for falſe money are not bailable by juſtices of the peace.

But they muſt take the examinations and informations, and bind over the witneſſes to the proper court, and commit the perſons accuſed. 1 H. H. 372.

Evidence. 25. It is not neceſſary there ſhould be two witneſſes in caſes of counterfeiting the coin, as it is in other high treaſons; but perſons may be convicted according to the courſe of the common law, by one witneſs only. 1 H. H. 318, 328.

Judgment. 26. The judgment for high treaſon, relating to the coin, is, to be drawn to the place of execution, and there hanged by the neck till he be dead. 2 *Haw.* 444.

But it is generally provided by the ſeveral ſtatutes, that this ſhall work no corruption of blood, nor loſs of dower.

Reward for convicting an offender. 27. Every perſon who ſhall apprehend any perſon who hath counterfeited any of the current [gold or ſilver] coin of this realm; or that for lucre or gain hath clipped, waſhed, filed, or any way diminiſhed the ſame; or hath altered ſhillings and ſixpences to make them reſemble guineas and half guineas, or
*378 halfpennies and farthings to make them * look like ſhillings and ſixpences; or ſhall bring or cauſe to be brought into this kingdom, any clipt, falſe, or counterfeit coin; and proſecute ſuch perſon to conviction: every ſuch perſon ſhall have a reward of 40l. In order to which, the judge ſhall give him under his hand, a certificate certifying the conviction, and the county in which it was made, and

that

that the offender was taken and profecuted by ſuch perſon; and if any diſpute ſhall ariſe between ſeveral perſons apprehending and proſecuting, the judge ſhall in the certificate appoint the reward to be paid amongſt them, in ſuch proportion as he ſhall think reaſonable. The ſaid certificate to be tendred to the ſheriff, who ſhall thereupon pay the ſame without fee, within one month after ſuch tender and demand, on pain of forfeiting to the party double the ſum, with treble coſts. The ſheriff to be repaid out of the treaſury. 6 & 7 W. c. 17. ſ. 9, 10, 11. 15 & 16 G. 2. c. 28. ſ. 7.

In like manner a reward of 10l ſhall be paid, for apprehending and convicting a counterfeiter of the copper money. 15 & 16 G. 2. c. 28. ſ. 7.

28. If any perſon being out of priſon, ſhall be guilty of clipping, coining, counterfeiting, waſhing, filing, or otherwiſe diminiſhing the [gold or ſilver] coin of this realm, and afterwards diſcover two or more perſons who have committed any of the ſaid crimes, ſo as two or more be convicted; he ſhall have the king's pardon, and if he is an apprentice he ſhall be made a freeman. 6 & 7 W. c. 17. ſ. 12. *Pardon to accomplices informing.*

In this clauſe at large in the ſtatute, is an inſtance of that multiplicity of words, which is ſometimes ridiculed in our laws; where it is ſaid, *two or more perſon or perſons*, and again, *two or more of the perſon or perſons*.

Further; if any perſon being out of priſon, ſhall be guilty of altering ſixpences or ſhillings, to make them look like half guineas or guineas; or altering farthings or halfpennies, to make them look like ſixpences or ſhillings; or of counterfeiting braſs or copper halfpennies or farthings; or of uttering falſe money,——and afterwards diſcover two or more perſons who have committed any of the ſaid crimes, ſo as two be convicted; he ſhall have the king's pardon. 15 & 16 G. 2. c. 28. ſ. 8.

29. The commiſſioners of the treaſury may iſſue a ſum not exceeding 600l yearly, for the charges and expences of the officers and others employed in the proſecution of offences in counterfeiting, diminiſhing, or otherwiſe concerning the current coin of this realm. 7 Ann. c. 24. ſ. 4. 15 & 16 G. 2. c. 28. ſ. 10. *Charges of proſecuting.*

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* COMMITMENT. *379

ANciently there were more felons committed to gaol without mittimus in writing, than were with it: ſuch were all the commitments, by conſtables, watchmen, and private perſons arreſting for felony, and bringing *Without warrant.*

bringing to the common gaol, long before there were any juſtices of the peace; and yet mittimus's are not of ſo ancient date even as they. 1 H. H. 610.

But now, ſince the *habeas corpus* act, a commitment in writing ſeems more neceſſary than it was in former times; otherwiſe the priſoner may be admitted to bail upon that act, whatſoever his offence may have been.

Commitment when.

When a ſtatute appoints impriſonment, but limits no time when, it is to be underſtood that he ſhall be impriſoned preſently. *Dalt.* c. 170.

Concerning which I will ſet forth,

I. Who may be committed.
II. To what place.
III. The form of the commitment.
IV. Charges of the commitment.
V. That the gaoler ſhall receive the priſoner.
VI. Shall certify the commitment.
VII. Commitment diſcharged.

I. Who may be committed.

Perſons not bailable, or not finding bail.

1. There is no doubt but that perſons apprehended for offences which are not bailable, and alſo all perſons who neglect to offer bail for offences which are bailable, muſt be committed. 2 *Haw.* 116.

Perſons guilty of contempt.

2. And it is ſaid, that whereſoever a juſtice is impowered by any ſtatute to bind a perſon over, or to cauſe him to do a certain thing, and ſuch perſon being in his preſence ſhall refuſe to be bound or to do ſuch thing, the juſtice may commit him to the gaol, to remain there till he ſhall comply. 2 *Haw.* 116.

Perſons charged with felony.

3. If a priſoner be brought before a juſtice, expreſsly charged with felony upon oath, the juſtice cannot diſcharge him, but muſt bail or commit him. 2 H. H. 121.

Perſons charged on ſuſ-
*380 *picion.*

4. But if he be charged with ſuſpicion only of felony, yet if there be no felony at all proved to be committed, * or if the fact charged as a felony be in truth no felony in point of law, the juſtice may diſcharge him; as if a man be charged with felony for ſtealing a parcel of the freehold, or for carrying away what was delivered to him, and ſuch like, for which tho' there may be cauſe to bind him over as for a treſpaſs, the juſtice may diſcharge him as to felony,

lony, becauſe it is not felony. But if a man be killed by another, tho' it be by miſadventure, or ſelf defence (which is not properly felony), or in making an aſſault upon a miniſter of juſtice in execution of his office (which is not at all felony), yet the juſtice ought not to diſcharge him, for he muſt undergo his trial for it; and therefore he muſt be committed, or at leaſt bailed. 2 H. H. 121.

5. But commitment by the juſtices of the peace almoſt in all caſes (except for the peace, good behaviour, felony, or higher offences) is but to retain the party till he hath made fine to the king; and therefore if he offer to pay it, or find ſureties by recognizance to pay it, he ought not to be committed, but to be delivered preſently. *Dalt.* c. 170. *Perſons not paying their fine.*

II. To what place.

1. By the 5 H. 4. c. 10. All felons ſhall be committed to the common gaol, and not elſewhere. *To the gaol.*

2. But by the 6 G. c. 19. Vagrants and other criminals, offenders, and perſons charged with ſmall offences, may for ſuch offences, or for want of ſureties, be committed either to the common gaol, or houſe of correction, as the juſtices in their judgment ſhall think proper. *Houſe of correction.*

3. And they may commit other offenders to the ſtocks, or other cuſtody by particular ſtatutes. *Stocks.*

4. Generally, if a man commit felony in one county, and be arreſted for the ſame in another county, he ſhall be committed to gaol in that county where he is taken. *Dalt.* c. 170. *Different county.*

Yet if he eſcapes, and is taken on freſh ſuit, in another county, he may be carried back to the county where he was firſt taken. *Dalt.* c. 170.

Alſo by the 24 G. 2. c. 55. If a perſon is apprehended upon a warrant indorſed, in another county, for an offence not bailable, or if he ſhall not there find bail, he ſhall be carried back into the firſt county, and be committed (or if bailable bailed) by the juſtices in ſuch firſt county.

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* III. Form of the commitment.

In whose name. 1. It must be in writing, either in the name of the king, and only tested by the person who makes it, or it may be made by such person in his own name, expressing his office, or authority, and must be directed to the gaoler, or keeper of the prison. 2 *Haw.* 119.

Yet the mention of the name and authority of the justice (lord *Hale* says) in the beginning of the mittimus, is not always necessary, for the seal and subscription of the justice to the mittimus, is sufficient warrant to the gaoler; for it may be supplied by averment, that it was done by the justice. 2 H. H. 122.

The party's name. 2. It should contain the name and surname of the party committed, if known; if not known, then it may be sufficient to describe the person by his age, stature, complexion, colour of his hair, and the like, and to add that he refuseth to tell his name. 1 H. H. 577.

Oath. 3. It is safe, but not necessary, to set forth, that the party is charged upon oath. 2 *Haw.* 120.

Cause. 4. It ought to contain the cause, as for treason, or felony, or suspicion thereof; otherwise if it contain no cause at all, if the prisoner escape it is no offence at all; whereas if the mittimus contained the cause, the escape were treason or felony, though he were not guilty of the offence; and therefore for the king's benefit, and that the prisoner may be the more safely kept, the mittimus ought to contain the cause. 2 Inst. 52.

And hereupon it appeareth, that a warrant or mittimus to answer to such things as shall be objected against him, is utterly against law. 2 Inst. 591.

Also, it ought to contain the certainty of the cause; and therefore if it be for felony, it ought not to be generally for felony, but it must contain the special nature of the felony, briefly, as for felony *for the death of such an one*, or for burglary *in breaking the house of such an one*; and the reason is, because it may appear to the judges of the king's bench, upon an *habeas corpus*, whether it be felony or not. 2 H. H. 122.

But the want hereof seems not to make the commitment absolutely void, so as to subject the gaoler to a false imprisonment; but it lies in averment to excuse the gaoler or officer, that the matter was for felony. 1 H. H. 584.

Not to be in the disjunctive. T. 17 G. 3. *K.* v. *Evered.* Two justices committed *Robert Collehole*, an apprentice, for running away from his master. An objection was taken to the *form* of the commitment, for the uncertainty thereof,

thereof, which run thus: * "As an apprentice *or* ſervant, for * 382
diſobeying his indentures *or* articles." And it was inſiſted, that this being in the disjunctive could not be ſupported, becauſe juſtices have not a power to commit ſervants generally, though they may commit ſervants of a particular deſcription.—In an anſwer thereto it was contended, that though the warrant ran in the disjunctive, yet as he now ſtated himſelf to be an apprentice, he was under that deſcription liable.—L. *Manſfield* ſaid, that the objection to the warrant of commitment as running in the disjunctive muſt undoubtedly prevail.—The counſel for the proſecution conſented to the priſoner's diſcharge. *Cal. Caſ.* 26.

There was another objection to this commitment, (viz.) the apprentice having been bound when under age, that therefore the indenture was voidable by him when he came of age. But this was over-ruled by the court; he having run away, would make uſe of his offence to avoid the puniſhment.

5. It muſt have an apt concluſion; as if it is for felony, to detain him till he be thence delivered by law, or by order of law, or by due courſe of law. 2 H. 120. 2 H. H. 123. *Concluſion.*

But if the concluſion be irregular, it doth not ſeem to make the warrant void, but the law will reject that which is ſurpluſage, and the reſt ſhall ſtand; ſo that if the matter appear to be ſuch, for which he is to remain in cuſtody, or be bailed, he ſhall be bailed or committed as the caſe requires, and not diſcharged, but the wrong concluſion ſhall be rejected. 1 H. H. 584.

It is alſo to be obſerved, that a commitment grounded on an act of parliament, ought to be conformable to the method preſcribed by it. As where the overſeers were committed for refuſing to account, and the warrant concluded in the common form, until they be duly diſcharged according to law, upon the return of an *habeas corpus* the court held the commitment void, becauſe the warrant ought to have concluded, there to remain until he ſhall account, as the 43 El. c. 2. doth appoint. And a difference is, where a man is committed as a criminal, and where only for contumacy; in the firſt caſe, the commitment muſt be, until diſcharged according to law; but in the latter, until he comply. 2 *Haw. Not.* 33.

Where a ſtatute appoints impriſonment, but limits no time how long, in ſuch caſe the priſoner muſt remain at the diſcretion of the court. *Dalt.* c. 170.

6. It muſt be under ſeal; and without this, the commitment is unlawful, the gaoler is liable to falſe * impriſonment, and the wilful eſcape by the gaoler, or breach of priſon by the felon, makes no felony. 1 H. H. 583. * 383

But this muſt not be intended of a commitment by the ſeſſions, or other court of record; for there the record itſelf, or the memorial thereof, which may at any time be entred of record, are a ſufficient warrant, without any warrant under ſeal. 1 H. H. 584.

Place. 7. It ſhould alſo ſet forth the place at which it is ma e, (that it may appear to be within the juriſdiction of the juſtice). 2 *Haw.* 119.

Time. 8. It muſt alſo have a certain date, of the year and day. 2 H. H. 123.

IV. Charges of the commitment.

By the 3 J. c. 10. Every perſon who ſhall be committed to the common or uſual gaol, within any county or liberty, by any juſtice of the peace, for any offence or miſdemeanor, the ſaid perſon ſo to be committed, having means or ability thereunto, ſhall bear his own reaſonable charges for ſo conveying or ſending him to the ſaid gaol, and the charges alſo of ſuch as ſhall be appointed to guard him to ſuch gaol, and ſhall ſo guard him thither: And if any ſuch perſon ſo to be committed, ſhall refuſe at the time of his commitment and ſending to the ſaid gaol, to defray the ſaid charges, or ſhall not then pay or bear the ſame; then ſuch juſtice ſhall, by writing under his hand and ſeal, give warrant to the conſtable of the hundred, or conſtable of the townſhip where ſuch perſon ſhall be dwelling and inhabit, or from whence he ſhall be committed, or where he ſhall have any goods within the county or liberty, to ſell ſuch and ſo much of the goods and chattels of the ſaid perſon ſo to be committed, as by the diſcretion of the ſaid juſtice ſhall ſatisfy and pay the charges of ſuch his conveying and ſending to the ſaid gaol, the appraiſement to be made by four of the honeſt inhabitants of the pariſh where ſuch goods ſhall be; the overplus to be delivered to the party.

And by the ſtatute of the 27 G. 2. c. 3. When any perſon, not having goods or money in the county where he is taken, ſufficient to bear the charges of himſelf and of thoſe who convey him, is committed to gaol, or to the houſe of correction, by warrant from a juſtice, then on application by the conſtable or other officer who conveyed him to any juſtice for ſuch county or place; [ſuch juſtice] ſhall upon oath examine into and aſcertain the reaſonable expences, *384 and ſhall without fee by his warrant * order the treaſurer to pay the ſame. But in *Middleſex* the ſame ſhall be paid by the overſeers of the poor of the pariſh where the perſon was apprehended.

Note; by the *habeas corpus* act, the charge of conveying an offender is limited not to exceed 12d a mile; which may be an argument for allowing as much in this caſe, eſpecially as ſecurity is to be given before a man is removed on that act by *habeas corpus*, that he ſhall not eſcape by the way, which renders guards in that caſe not ſo neceſſary.

V. Gaoler ſhall receive the priſoner.

If the gaoler ſhall refuſe to receive a felon, or take any thing for receiving him, he ſhall be puniſhed for the ſame, by the juſtices of gaol delivery. 4 Ed. 3. c. 10. *Dalt.* c. 170.

But

But if a man be committed for felony, and the gaoler will not receive him, the conſtable muſt bring him back to the town where he was taken; and that town ſhall be charged with the keeping of him, until the next gaol delivery: or the perſon that arreſted him, may in ſuch caſe keep the priſoner in his own houſe, as it ſeemeth. *Dalt.* c. 170.

But in other caſes it ſeems, that regularly no one can juſtify the detaining a priſoner in cuſtody out of the common gaol, unleſs there be ſome particular reaſon for ſo doing; as if the party be ſo dangerouſly ſick, that it would apparently hazard his life to ſend him to the gaol, or there be evident danger of a *reſcous* from rebels, or the like. 1 *Haw.* 118.

VI. Shall certify the commitment.

By the 3 H. 7. c. 3. The ſheriff or gaoler ſhall certify the commitment to the next gaol delivery.

VII. Commitment diſcharged.

It ſeems that a perſon legally committed for a crime, certainly appearing to have been done by ſome one or other, cannot be lawfully diſcharged by any one but the king, till he be acquitted on his trial, or have an *ignoramus* found by the grand jury, or none to proſecute him on a proclamation for that purpoſe by the juſtices of gaol delivery. But if a perſon be committed on a bare ſuſpicion, without an indictment, for a ſuppoſed crime, where afterwards it appears that there was none, as for the murder * of a perſon thought * 385
to be dead, who afterwards is found to be alive; it hath been holden, that he may be ſafely diſmiſſed without any farther proceeding, for that he who ſuffers him to eſcape is properly puniſhable only as an acceſſary to his ſuppoſed offence; and it is impoſſible that there ſhould be an acceſſary, where there can be no principal; and it would be hard to puniſh one for a contempt in diſregarding a commitment founded on a ſuſpicion, appearing in ſo unconteſted a manner to be groundleſs. 2 *Haw.* 121.

Mittimus for felony.

Weſtmorland. J. P. *eſquire*, &c. *one of the juſtices of our lord the king, aſſigned to keep the peace in the ſaid county, and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in the ſaid county committed; To the keeper of the gaol of our ſaid lord the king at* ——— *in the ſaid county, or to his deputy there,*

and

and to each of them, greeting. Whereas A. O. *late of* ——— *in the ſaid county, labourer, hath been arreſted by the conſtable of* ——— *in the ſaid county, for a ſuſpicion of a felony by him, as it is ſaid, committed, in ſtealing a black mare, of the value of* 40*s. the property of* A. P. *of* ——— *in the ſaid county, yeoman: Therefore, on the behalf of our ſaid lord the king, I command you and each of you, that you or one of you receive the ſaid* A. O. *into your cuſtody in the ſaid gaol, there to remain till he be delivered from your cuſtody by the law and cuſtom of* England. *Given under my hand and ſeal at* ——— *in the ſaid county, the* ——— *day of* ——— *in the* ——— *year of the reign of our ſaid lord* ———:

Another.

Weſtmorland. J. P. *eſquire*, &c. *To the keeper of the common gaol at* ——— *in the ſaid county, or to his deputy there: Theſe are in his majeſty's name to charge and command you, that you receive into your ſaid gaol the body of* A. O. *late of* ——— *in the ſaid county, yeoman, taken by* A. C. *conſtable of* ——— *in the ſaid county, and by him brought before me for ſuſpicion of felony, that is to ſay, for ſtealing* ———. *And that you ſafely keep the ſaid* A. O. *in your ſaid gaol, until the next general gaol delivery for the ſaid county* [if he be not bailable; or if bailable, then thus] *until he ſhall thence be delivered by due courſe of law. And herein fail you not*, &c.

*386

* Another.

Weſtmorland. J. P. *eſquire*, &c. *To the keeper of* ——— *I ſend you herewithal the body of* A. O. *late of* ——— *in the ſaid county, labourer, brought before me this preſent day, and charged with the felonious taking and carrying away forty ſheep, the property of* ——— *which alſo he hath confeſſed upon his examination before me* [by which he is not bailable]: *Therefore theſe are on the behalf of our ſaid lord the king to command you, that immediately you receive the ſaid* A. O. *and him ſafely keep in your ſaid gaol, until he be thence delivered by the due order of law. Hereof fail you not, as you will anſwer for your contempt at your peril. Given under my hand and ſeal at* ——— &c.

Or thus, in the king's name.

Weſtmorland. GEORGE *the third by the grace of God, of* Great Britain, France, *and* Ireland, *king, defender of the faith, and ſo forth: To the keeper of our gaol at* ———

in

in our ſaid county of W. *or to his deputy, greeting: Whereas* A. O. *late of* ——— *in our ſaid county, yeoman, is arreſted for ſuſpicion of felony, by him, as it is ſaid, committed, in feloniouſly taking and carrying away* ——— *of the value of* ——— *the property of* ——— *We therefore command you, and each of you, that you receive him the ſaid* A. O. *into your cuſtody in our ſaid gaol, or that one of you do receive him, there to remain till he be delivered from your cuſtody, according to the law of our kingdom of* England. *Witneſs* J. P. *eſquire, one of the juſtices aſſigned to keep the peace in our ſaid county, and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in our ſaid county committed at* ——— *in the ſaid county, the* ——— *day of* ——— *in the* ——— *year of our reign.*

Form of a warrant of commitment in general.

Weſtmorland. J. P. *eſquire, one of the juſtices of our lord the king, aſſigned to keep the peace within the ſaid county, To the conſtable of* ——— *in the ſaid county, and to the keeper of* ——— *at* ——— *in the ſaid county.*

Theſe are to command you the ſaid conſtable, in his majeſty's name, forthwith to convey and deliver into the cuſtody of the ſaid keeper of the ſaid ——— *the body of* A. O. *charged before me with* [here ſpecify the offence]. *And you the ſaid keeper are hereby required to receive the ſaid* A. O. *into your cuſtody * in the ſaid* ——— *and him there ſafely to keep,* * 387 &c. *Given under my hand and ſeal the* ——— *day of* ——— *in the* ——— *year of the reign of his ſaid majeſty king* George *the third.*

COMMON PRAYER.

Impugners of the book of common prayer.

1. IMpugners of the form of worſhip in the church of *England*, eſtabliſhed by law, and contained in the book of common prayer; of the 39 articles; of the rites and ceremonies of the church; and of epiſcopal government; ſhall be excommunicated *ipſo facto*, and not reſtored but by the biſhop or archbiſhop on their repentance. *Can.* 5, 6, 7.

2. If

Miniſter derogating from the book of common prayer.

2. If any parſon, vicar, or other miniſter, that ought to uſe the common prayer, or to miniſter the ſacraments, ſhall refuſe to do the ſame, or (wilfully ſtanding in the ſame) ſhall uſe any other form, or ſhall ſpeak any thing in derogation of the ſame book, or of any thing therein contained; he ſhall, on conviction, for the firſt offence forfeit to the king one year's profit of all his ſpiritual promotions, and be impriſoned for ſix months; for the ſecond offence, ſhall be deprived of all his ſpiritual promotions, and be impriſoned for a year; and for the third offence, ſhall be deprived of all his ſpiritual promotions, and be impriſoned during life. And if he has no ſpiritual promotion, he ſhall for the firſt offence be impriſoned for a year; and for the ſecond offence, during life. 1 El. c. 2. ſ. 4 — 8.

But this ſhall not reſtrain the ſpiritual court from proceeding againſt theſe offenders; and they may be deprived by the ſaid court, according to the courſe of the ſpiritual law, for the firſt offence. *id.* ſ. 16, 23. 1 *Haw.* 9.

Any perſon depraving the book of common prayer.

3. If any perſon whatſoever ſhall in plays, ſongs, or by other open words, ſpeak any thing in derogation of the ſame book, or any thing therein contained; or ſhall by open fact cauſe or procure any miniſter in any place to ſay common prayer openly, or to miniſter any ſacrament, in other form, or ſhall interrupt or let any miniſter to ſay the ſaid common prayer; he ſhall (being indicted for the ſame at the next aſſizes) forfeit to the king for the firſt offence 100 marks, and for the ſecond 400 marks; (which if not paid in 6 weeks after conviction, he ſhall ſuffer 6 months impriſonment for the firſt offence, and 12 months for the
*388 * ſecond); and for the third offence ſhall forfeit all his goods and chattels, and be impriſoned during life. 1 El. c. 2. ſ. 9, 10, 11, 12, 13, 20.

Reſident incumbent to read the common prayer once a month.

4. Where an incumbent reſides upon his living, and keeps a curate, the incumbent himſelf (not having lawful impediment to be allowed by the biſhop) ſhall at leaſt once a month openly and publickly read the common prayer, and (if there be occaſion) adminiſter the ſacraments, and other rites of the church; on pain of 5l. to the poor, on conviction by confeſſion, or oath of two witneſſes, before two juſtices; and in default of payment in ten days, the ſame to be levied by the churchwardens or overſeers, by diſtreſs and ſale, by warrant of ſuch juſtices. 13 & 14 C. 2. c. 4. ſ. 7.

CONFESSION.

CONFESSION is twofold, either *expreſſed*, or *implied*.

An

An *expreſs* confeſſion is, where a perſon directly confeſſes the crime with which he is charged; which is the higheſt conviction that can be. 2 *Haw.* 333.

But it is uſual for the court, eſpecially if it be out of clergy, to adviſe the party to plead and put himſelf upon his trial, and not preſently to record his confeſſion, but to admit him to plead. 2 H. H. 225.

An *implied* confeſſion is, where a defendant in a caſe not capital, doth not directly own himſelf guilty, but in a manner admits it by yielding to the king's mercy, and deſiring to ſubmit to a ſmall fine; which ſubmiſſion the court may accept of if they think fit, without putting him to a direct confeſſion. 2 *Haw.* 333.

It ſeems that the confeſſion of the defendant taken upon an examination before juſtices of the peace, or in diſcourſe with private perſons, may be given in evidence againſt the party confeſſing, but not againſt others. 2 *Haw.* 429.

All thoſe who on their examination own themſelves guilty of a felony alledged againſt them, and are charged in their *mittimus* with the felony ſo confeſſed, ſeem to be excluded from bail; for bail is only proper where it ſtands indifferent whether the party be guilty or innocent. 2 *Haw.* 97.

Conies. See *Game.*

Conjuration. See *Witchcraft.*

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*CONSPIRACY. *389

I. What it is.

II. How puniſhable.

I. What it is.

1. BY the common law there can be no doubt, but that all confederates whatſoever, wrongfully to prejudice a third perſon, are highly criminal; as where divers perſons confederate together by indirect means to impoveriſh a third perſon, or falſly and maliciouſly to charge a man with being the reputed father of a baſtard child, or to maintain one another in any matter whether it be true or falſe. 1 *Haw.* 190. *By the common law.*

2. And conſpiracy by ſtatute is as follows: "Conſpirators are they, that do confederate or *By ſtatute.*

" bind themſelves by oath, covenant, or other alliance, that every " of them ſhall aid and bear the other falſly and maliciouſly to in- " dict, or cauſe to indict, or falſly to move or maintain pleas; and " ſuch as retain men in the country, with liveries or fees to main- " tain their malicious enterpriſes; and this extendeth as well to the " takers as to the givers: And ſtewards and bailiffs of great lords, " who by their office or power, undertake to bear or maintain " quarrels, pleas, or debates, that concern other parties than ſuch " as touch the eſtate of their lords or themſelves." 33 Ed. 1. ſt. 2.

From this definition of conſpirators, it ſeems clearly to follow, contrary to the opinion of Lord *Coke*, that not only thoſe who actually cauſe an innocent man to be indicted, and alſo to be tried upon the indictment, whereupon he is lawfully acquitted, are properly conſpirators, but that thoſe alſo are guilty of this offence, who barely conſpire to indict a man falſely and maliciouſly, whether they do any act in proſecution of ſuch conſpiracy or not. 1 *Haw.* 189. L. *Raym.* 1169.

But an *action* will not lie for the conſpiracy unleſs it be put in execution; for in ſuch caſe, the *damage* is the ground of the action. L. *Raym.* 378.

Alſo it plainly appears from the words of the ſtatute, that one perſon alone cannot be guilty of conſpiracy, within the purport of it; from whence it follows, that if all the defendants who are proſecuted for ſuch a conſpiracy be acquitted but one, the acquittal of
*390 the reſt is the acquittal * of that one alſo: And upon the ſame ground it hath been holden, that no ſuch proſecution is maintainable againſt a huſband and wife only, becauſe they are eſteemed but as one perſon in law: But it is certain, that an action on the caſe, in the nature of a conſpiracy, may be brought againſt one only: Alſo, it hath been reſolved, that if ſuch an action be brought againſt ſeveral perſons, and all but one be acquitted, yet judgment may be given againſt that one only. 1 *Haw.* 192.

In the caſe of *K.* againſt *Cope* and others, H. 5 G. The huſband, and wife, and ſervants, were indicted for a conſpiracy to ruin the trade of the proſecutor, who was the king's card-maker. The evidence againſt them was, that they had at ſeveral times given money to the proſecutor's apprentices, to put greaſe into the paſte, which had ſpoiled the cards. But there was no account given, that ever more than one at a time was preſent, tho' it was proved they had all given money in their turns. It was objected, that this could not be a conſpiracy; for ſeveral perſons might do the ſame thing, without having any previous communication with each other. But it was ruled, that the defendants being all of a family, and concerned in making of cards, it would amount to evidence of a conſpiracy. *Str.* 144.

In the caſe of *K.* againſt *Kinnerſley* and *Moore*, T. 5. G. An information was brought, ſetting forth that the defendants being evil diſpoſed

diſpoſed perſons, in order to extort money from my lord *Sunderland*, did conſpire together to charge my lord with endeavouring to commit ſodomy with the ſaid *Moore*. The defendant *Kinnerſley* only appears, and pleads to iſſue, and is found guilty. And now exception was taken in arreſt of judgment, that to every conſpiracy there muſt be two perſons at leaſt, whereas here is only one brought in and found guilty, and the other poſſibly may be acquitted. But it was anſwered, that this is arguing from what has not happened, and probably never will; for tho' *Moore* may have an opportunity to acquit himſelf, and is not concluded by the verdict as *Kinnerſley* is, yet as the matter now ſtands, *Moore* himſelf is found guilty, for the conſpiracy is found as it is laid, and therefore judgment may be given againſt one, before the trial of the other. And a caſe was quoted, where ſeveral were indicted for a riot, *with many others*, and two only were found guilty; and it was objected, that there muſt be three to make a riot; but upon the words, *with many others*, judgment was given againſt the defendants. And the court overruled the exception. And the * defendant had ſentence. And in the * 391
Eaſter term following, *Moore* alſo was convicted, and had judgment. *Str.* 193.

And E. 18 G. 2. *K.* againſt *Eliz. Nicols*. She was indicted for conſpiring with *Tho. Bygrave*, unjuſtly to charge *William Frankland* with a robbery, and for that purpoſe going before a juſtice, where *Bygrave* ſwore it upon him. *Nicols* only came in, and pleaded not guilty. And the jury found that ſhe was guilty, but that *Bygrave* died before the indictment was preferred. Exception was taken, that one alone cannot be guilty of a conſpiracy, and here is but one convicted. But the court over-ruled this, on the authority of *Kinnerſley*'s caſe, in which caſe there was a poſſibility of contradictory verdicts, which here cannot be. *Str.* 1227.

II. How puniſhed.

On action.

1. It is clear, that thoſe who are convicted of conſpiracy at the ſuit of the party, ſhall have judgment of fine and impriſonment, and to render the plaintiff his damages. 1 *Haw.* 193.

On indictment or information.

2. Alſo it is certain, that he who is convicted at the ſuit of the king, of a conſpiracy to accuſe another of a matter which may touch his life, ſhall have judgment that he ſhall loſe the freedom and franchiſe of the law (whereby he is diſabled from being put upon any jury, or to be ſworn as a witneſs, or even to appear in perſon in any of the king's courts) and alſo that his houſes, lands and goods ſhall be ſeized into the king's hands, and his houſes and lands ſtripped and waſted, his trees rooted up, and his body impriſoned. And this is commonly called *villainous* judgment, and is

given by the common law, and not by any ſtatute, and is ſaid generally in ſome books to be the proper judgment upon every conviction of conſpiracy at the ſuit of the king, without any reſtriction to ſuch as endangered the life of the party; but this point doth not ſeem to be any where ſettled. 1 *Haw.* 193.

But this judgment hath been but ſeldom given; there being no inſtance of it ſince the reign of *Edward* the third. *Burrow.* Mansfield. 996, 1027.

In the caſe of *Kinnerſley* and *Moore* above mentioned, *Kinnerſley* was ſentenced to be fined 500l, to ſuffer a year's impriſonment, and to find ſureties for his good behaviour for ſeven years. *Moore* was ſentenced to ſtand in the pillory, ſuffer a year's impriſonment, and to find ſureties in the like manner for ſeven years. *Str.* 196.

*392 T 2 G. 3. *K.* and *Riſpal.* An indictment was found at the ſeſſion againſt the defendant and two others, for a conſpiracy. The indictment ſet forth, that the defendants, wickedly and maliciouſly deviſing and intending unjuſtly to vex and aggrieve one *John Chilton*, and to deprive him of his good name, fame, credit, and reputation, wickedly and lawfully did among themſelves conſpire, combine, confederate, and agree, falſly and without any reaſonable or probable cauſe, to charge and accuſe the ſaid *John Chilton*, that he the ſaid *John Chilton* had then lately taken out of a bag a quantity of human hair of the goods and chattels of the ſaid *Riſpal*: That the two other offenders, in purſuance of the ſaid conſpiracy, ſaid to *Chilton*, that he was a man of credit, and had better make it up than have his credit blaſted: And that *Riſpal*, in further purſuance of the ſaid conſpiracy, unlawfully and wickedly did extort from the ſaid *Chilton* 30l, and a promiſſory note of 33l, as a compoſition for the ſaid offence, and to deſiſt from proſecution. On the indictment being removed by certiorari, motion was made in arreſt of judgment, upon two objections: Firſt, that the juſtices at their ſeſſions have no juriſdiction over conſpiracies, any more than over perjury, uſury, and forgery, it being not ſpecified in their commiſſion, nor given them by any ſpecial ſtatute. Secondly, the indictment doth not charge them to have conſpired to fix any crime on the defendant, but only taking hair out of a bag, which might be a lawful act. To the firſt objection it was anſwered, That the juſtices in ſeſſions, under the general words of the commiſſion, have cognizance of all crimes that tend, either directly or conſequentially, to a breach of the peace: That conſpiracies have this tendency, in the ſame manner as libels, which are indictable at the ſeſſions, without being ſpecified in the commiſſion; ſo is extortion alſo, and this is a conſpiracy to extort. To the ſecond objection it was anſwered, That the charge is, a conſpiracy to extort money; by what means is not material: That *Riſpal* did actually extort it; which is a direct and poſitive charge againſt him. So that either way there is ground ſufficient for the court to give judgment againſt *Riſpal*.—By lord *Mansfield* chief juſtice: The caſe lies in a narrow compaſs.

The

The first question is, Whether the justices in sessions have a jurisdiction over conspiracies. No authority has been cited to shew, that they have not, nor that they have. It must therefore be determined upon general principles. The cases of perjury, forgery, and usury stand upon their own special grounds, and it has been * determined, that the justices have no jurisdiction there. This * 393
offence of a conspiracy is a trespass; and trespasses are indictable at sessions, tho' not committed with force and arms. They tend to the breach of the peace, as much as cheats or libels, which are established to be within the jurisdiction of the sessions. As therefore there is no authority to the contrary, I think that the justices had a jurisdiction here. The second question is, Whether a sufficient crime be laid in the indictment to enable the court to give judgment. The crime is laid as an unlawful conspiracy. This, whether it be to charge a man with criminal acts, or such only as may affect his reputation, is fully sufficient. The several facts in the indictment are not to be considered as distinct and separate charges; but as one and the same united and continued offence pursued thro' its different stages. And then it is clear, that the whole will amount to an indictable offence, namely, the getting money from a man, by conspiring to charge him with a false fact. *Bur. Mansf.* 1320. *Black. Rep.* 368.

CONSTABLE.

THE office of a constable, in executing of warrants, is treated of under the titles *Arrest* and *Warrant*; and in like manner the other particulars of his duty may be found under the respective titles throughout the book; this title treating only of the office of a constable in general.

I. Of the antiquity and original of constables.
II. Who shall be a constable.
III. How chosen and sworn.
IV. His power as a conservator of the peace.
V. His duty as a subordinate officer to justices of the peace.
VI. His indemnity and protection in his office.
VII. Concerning the expences of his office.
VIII. Concerning his account and removal from his office.

I. Of

394* * *I. Of the antiquity and original of conſtables.*

Antiquity of conſtables in general.

1. The ſundry names of high conſtables, or conſtables of lathes, rapes, wapentakes, hundreds, and franchiſes; and the divers names alſo of petty conſtables, tythingmen, borſholders, boroheads, headborows, chief pledges, and ſuch other (if there be any) that bear office in towns, pariſhes, hamlets, tythings, or borows, are all in effect but two, that is to ſay, *conſtables* and *borſholders*. Lamb. Conſt.

This word *conſtable* hath afforded matter of much diſquiſition to the learned. It is evidently a compound; but from what two original words it hath ſprung, hath been variouſly conjectured. Hiſtory traceth it from its arrival in *England*, backwards through *France* and *Germony*, and *Greece*, to the imperial ſeat at *Conſtantinople* in the days of *Conſtantine* the Great. From whence we aſcend farther ſtill towards the eaſt, where we find the word *cône* or *cûne* in *Paleſtine*, which ſignified in the times of the old teſtament a ſtability, ſtrength, or ſtay. Of which word there ſeem to be ſome traces in the mongrel name of *Laocoon* at *Troy*; and more eſpecially of this ſame *Conſtantine*, who was himſelf of oriental extraction, having ſprung from *Dardania*, a country of the upper *Moſia*, and was ſaid by his flatterers to have been deſcended from *Dardanus* and the *Trojans*. And perhaps this appellation of the emperor might give occaſion to the adopting of the word into the *Roman* language at that time. For it was then that the word *count* (the genuine offspring of *cone* or *cune*) firſt became a name of dignity, and from thence travelled weſtwards (with a little variation according to the genius of each language) throughout the provinces. Amongſt the *Saxons*, the word was *koning* or *kyninge*, from whence undoubtedly we receive our *Engliſh* word *king*. Again, the word *ſtole*, *ſtalle*, *ſtaſle*, *ſtable*, by an eaſy tranſmutation of thoſe letters frequent in almoſt all languages (and which ſeemeth the other conſtituent of the word *conſtable*) is likewiſe common to thoſe languages of the middle ages, and ſignifieth a ſtanding place, diviſion, or department, called by the Romans *ſtatio*; and all of them probably from the ſame origin with the Latin *ſto*, and the ancient *Greek* word ϛαω. So that, according to this etymology, the word *conſtable* will properly ſignify the ſtability or ſtay of the place, or the ſtrong man of the diviſion. The *German* word is *conneſtaſle*; the French *conneſtable*, the Italian *conneſtabile*; the Spaniſh *condeſtable*, from the word *conde* which they
*395 uſe for *count*. All which ſeem to be comprehended * in the imperial denominations of the *Conſtantine* family, ſuch as *Conſtans*, *Conſtantius*, *Conſtantinus*, *Conſtantia*, *Conſtantina*, *Conſtantianus*, *Conſtantinacius*, and the like.

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As touching *borſholders* (which is the other general name, and doth contain within it the meaning of tything-men, borowheads, headborows, thirdboroughs, and chief pledges) that is made up of the Saxon *borge*, *borrow* or *borhoe*, a pledge, and *ealder*, the elder, chief, or head; and *borſh-ealder* in one word doth mean the chief or head of the ſureties or pledges. For the underſtanding whereof, it is to be remembered, that by the ancient laws of this realm (before the coming in of king *William* the conqueror) it was ordained for the more ſure keeping of the peace, and for the better repreſſing of thieves and robbers, that all free-born men ſhould caſt themſelves into ſeveral companies, by ten in each company; and that every of thoſe ten men of the company ſhould be ſurety and pledge for the forthcoming of his fellows; ſo that if any harm were done by any of theſe ten, againſt the peace, then the reſt of the ten ſhould be amerced, if he of their company that did the harm ſhould fly, and were not forthcoming to anſwer to that wherewith he ſhould be charged. And for this cauſe, the companies are yet in ſome places of *England* called *boroes*, of the ſaid word *borge*, *borrow* or *borhoe*, ſignifying a pledge or ſurety; and in other places they are called *tythings*, becauſe they contain (as hath been ſaid) the number of ten men with their families. And even as ten times ten do make an hundred, ſo becauſe it was then alſo appointed that ten of theſe companies ſhould at certain times meet together for their matters of greater weight, therefore that general aſſembly, or court, was and yet is called a *hundred*. Furthermore, it was then alſo ordained, that if any man were of ſo evil credit, that he could not get himſelf to be received into one of theſe tythings or boroes, then he ſhould be ſhut up in priſon, as a man unworthy to live at liberty amongſt men abroad. Now whereas every of theſe tythings or boroes did uſe to make choice of one man amongſt themſelves, to ſpeak and to do in the name of them all; he was therefore in ſome places called the tythingman, in other places the boroes elder, (whom we now call borſholder), in other places the borohead, or headborow, and in ſome other places the chief pledge, which laſt name doth plainly expound the other three that are next before it; for head or elder of the boroes, and chief of the pledges are all one; and in ſome ſhires, where every third borough hath a conſtable, there the officers of the other two are called * *thirdborows*. And in *396 theſe tythings, or boroes, ſundry good orders were obſerved; and amongſt others, firſt, that every man of the age of 12 years ſhould be ſworn to the king: Then, that no man ſhall be ſuffered to dwell in any town or place, unleſs he were alſo received into ſome ſuch ſuretiſhip and pledge as is aforeſaid: Thirdly, that if any of theſe pledges were impriſoned for his offence, then he ought not to be delivered without the aſſent of the reſt of his pledges: Again, that no man might remove out of one tything, or boroe, to dwell in another, without lawful warrant in that behalf: Laſtly, that every of theſe pledges ſhould yearly be preſented and brought forth by their

chief

chief pledge, at a general assembly for that purpose, which we yet in remembrance thereof do call the *view of frankpledge*, or the leet court. *Lamb.* Const.

Some small shadow of which antiquity we seem still to retain in a common phrase in drinking, when a man says to another that he will *pledge* him; which is said to have begun when the *Danes* tyrannized in this land; and the meaning was, to encourage the person to drink freely, for that the other would be surety to him that no one should do him any bodily harm whilst he was drinking.

Also we do still retain the word *borrow* as a verb in our language, signifying to take money upon a pledge or surety.

In some places, at this day, there is both a tithingman and constable, where the tithingman is as it were a deputy to execute the office in the constable's absence: but there are some things which a constable hath power to do, that tithingmen cannot intermeddle with; for the constable may do whatever the tithingman may do, but not on the contrary, the tithingman not having an equal power with the constable. But in places where there is no constable, the office and authority of tithingman seems to be all one under a different name. 1 *Black.* 357.

Antiquity of high constables.

2. By the statute of *Winchester*, "In every "hundred and franchise two constables shall be "chosen to make the view of armour: and they "shall present defaults of armour, and of suits of "towns, and of highways, and such as lodge strangers in uplan-"dish towns, for whom they will not answer." 13 Ed. 1. st. 2. c. 6.

And from hence lord *Coke*, and others, will have it, that high constables are no ancienter than this statute: But Mr. *Hawkins* (agreeably with *Lambard*, *Dalton*, and other authorities) says, that it seems to be the better opinion, that both constables of hundreds, which are commonly called high constables, and also constables of
*397 tythings, * which are at this day commonly called petty constables, or tithingmen, were by the common law, and not first ordained by the statute of *Winchester*; for that statute doth not say, that there shall be such officers constituted, but clearly seems to suppose that there were such before the making of it. 2 *Haw.* 61.

In short, the truth of the matter seems to be this: The far greatest part of the business of high constables, at this day, is not at all appropriated to them, as high constables; but only as officers to execute the precepts of the justices of the peace, which any other person may do as well as they. The original and proper authority of an high constable, as such, seems to be the very same and no other, within his hundred, as that of the petty constable within his vill; and therein, most probably, he is coeval with the petty constable. The other usual branches of his office, such as the surveying

veying of bridges, the iſſuing precepts concerning the appointing of overſeers of the poor, ſurveyors of the highways, aſſeſſors and collectors of the land tax and window duties, and in like manner the viewing of armour by the above mentioned ſtatute, are in him, not of neceſſity, but as matter of convenience, and it is diſcretionary in the juſtices whom they will appoint to be their officers in theſe caſes; others have been ſuperadded to their office, for the like reaſon of convenience, by ſundry acts of parliament, ſuch as the iſſuing precepts for the licenſing of alehouſes, for levying county rates, and for returning liſts of jurors; for that one perſon can do all the ſame much eaſier and cheaper than ſo many different perſons.

II. Who ſhall be a conſtable.

Women. 1. It hath been ſaid, that a cuſtom in a town, that the inhabitants ſhall ſerve the office of conſtable by turns, according to the ſituation of their ſeveral houſes, is not good; for that, by ſuch a courſe, it may come to a woman's turn to be a conſtable, as inhabitant of one of thoſe houſes; yet we find ſuch cuſtoms allowed to be good in later books; and it ſeems, that the conſequence of the reaſoning above mentioned may well be denied, ſince a woman in ſuch caſe may procure another to ſerve for her. 2 *Haw.* 63.

Phyſicians. 2. Alſo it ſeems, that a practiſing phyſician, being choſen conſtable in purſuance of ſuch cuſtom, has no remedy for his diſcharge; for that there are no precedents of this kind, and his calling is private. 2 *Haw.* 63.

*398 * But by the 32 H. 8. c. 40. The preſident, commons, and fellows of the faculty of phyſick in *London*, ſhall not be choſen conſtables.

Surgeons. 3. And by the 5 H. 8. c. 6. and 18 G. 2. c. 15. Surgeons in *London* ſhall be freed and exempted from the office of conſtable.

In the caſe of *K.* and *Pond*, M. 5 G. On an indictment againſt *Pond*, a ſurgeon, for refuſing to be conſtable, it was moved to the attorney general that a *noli proſequi* might be granted, for that by the 5 H. 8. c. 6. (and by the 32 H. 8. c. 40. for the incorporating of barbers and ſurgeons, which incorporation was diſſolved by the above act of 18 G. 2.) all perſons of the corporation of ſurgeons within *London* are exempt; and tho' it hath been held that phyſicians are not exempt, yet by the equity of thoſe ſtatutes, and by the cuſtom of the realm, *all* ſurgeons have been allowed the ſame privilege: and therefore a *noli proſequi* was allowed, unleſs cauſe ſhewn. And no cauſe was ſhewed, the reporter ſays, that ever he heard of. *Comyns*, 312.

Apothecaries.

4. By the 6 & 7 W. c. 4. Apothecaries in *London*, within ſeven miles thereof, being free of the company of apothecaries; and alſo thoſe in the country who have ſerved ſeven years apprenticeſhip, ſhall be exempted from the office of conſtable.

Attornies.

5. Alſo it ſeems certain, that if a ſworn attorney, or other officer, of the courts at *Weſtminſter*, be choſen into this office, he may have a writ of privilege for his diſcharge, by reaſon of his neceſſary attendance in thoſe courts: and it hath been reſolved, that ſuch officers ſhall have this privilege, not only where there is no ſpecial cuſtom concerning the election of conſtables, but alſo where they are choſen by a particular cuſtom, in reſpect of their eſtates, or otherwiſe; for that no ſuch cuſtom ſhall be intended to be more ancient than the uſages of thoſe courts, and therefore ſhall give way to them. 2 *Haw.* 63.

Barriſters at law, ſervants to members of parliament.

6. And upon the like reaſons, it is taken for granted, that practiſing barriſters at law, and the ſervants of members of parliament, have the ſame privilege; but there ſeem to have been no reſolutions to this purpoſe. 2 *Haw.* 63.

Aldermen of London.

7. Alſo it hath been reſolved, that an alderman of *London*, for the like reaſons, is not compellable to be a conſtable. 2 *Haw.* 63.

Captain of the guards.

8. But it hath been holden, that a captain of the king's guards, being preſented to ſerve as conſtable, in purſuance * of a cuſtom in reſpect of his lands
* 399 in a town, cannot claim this privilege; for that notwithſtanding he is bound by his office to perſonal attendance on the king's perſon, yet ſuch office being of late inſtitution, ſhall not prevail againſt an ancient cuſtom. 2 *Haw.* 63.

Militia man.

9. But a perſon ſerving for himſelf as a private man in the militia, ſhall during the time of ſuch ſervice be exempted from the office of conſtable. 2 G. 3. c. 20. ſ. 76.

Where there are others ſufficient.

10. Yet if ſuch an officer as before mentioned, or a gentleman of quality who hath no ſuch office, or a practiſing phyſician, be choſen conſtable of a town, which hath ſufficient perſons beſides to execute this office, and no ſpecial cuſtom concerning it; perhaps he may be relieved by the king's bench: but it ſeems that even a cuſtom cannot exempt fitting perſons from ſerving the office of conſtable, where there are not ſufficient beſides them to execute it. But theſe points ſeem not to be ſettled. 2 *Haw.* 63.

Diſſenting teachers.

11. By the 1 W. c. 18. ſ. 11. Every teacher or preacher in holy orders, or pretended holy orders, in a congregation tolerated by law, ſhall from

from the time of his ſubſcription and taking the oaths, be exempted from the office of conſtable.

12. And by 10 & 11 W. c. 23. ſ. 2, 3. The proſecutor of a felon to conviction, or perſon to whom he ſhall aſſign the certificate thereof, ſhall be diſcharged from the office of conſtable. *Proſecutors of felons.*

13. Inaſmuch as the office of a conſtable is wholly miniſterial, and no way judicial, it ſeems that he may appoint a deputy to execute a warrant directed to him, when by reaſon of ſickneſs, abſence, or otherwiſe, he cannot do it himſelf; yet it doth not ſeem to be ſettled, that a conſtable can make a deputy, without ſome ſpecial cauſe. 2 *Haw.* 62. *Whether he may appoint a deputy.*

In the caſe of *Medhurſt* and *Waite*, M. 2 G. 3. The high conſtable appointed a deputy to billet ſoldiers under the mutiny act: This appointment was by parol only, and the deputy was not ſworn. By lord *Mansfield* and the court: The high conſtable had power by the act to billet ſoldiers; and he may appoint a deputy to this particular miniſterial act. This is a miniſterial (not a judicial) act: And a conſtable may appoint a deputy to do miniſterial acts. *Burr. Mansf.* 1259.

And the ſuperior muſt be anſwerable for his deputy, upon any miſcarriage; unleſs the deputy is duly allowed and ſworn; for then he is conſtable. *Wood*, b. 1. c. 7.

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* 14. And by 1 W. c. 18. ſ. 7. If any perſon diſſenting from the church of *England*, ſhall be ſworn conſtable, and ſhall ſcruple to take upon him the office, in regard of the oaths, or any other matter required to be done in reſpect of ſuch office; he may execute it by a ſufficient deputy by him to be provided, to be allowed by ſuch perſons, and in ſuch manner, as ſuch officer ſhould have been allowed. *Diſſenters appointing a deputy.*

III. How choſen and ſworn.

1. It ſeemeth, regularly, that the petty conſtable ought to be choſen in the leet; and the high conſtable (properly ſo called) in the torn, which is the general leet of the whole hundred: and if there be no leet, then that the petty conſtable ought to be choſen alſo in the torn. *By whom to be choſen.*

But whether they are to be choſen and appointed by the ſuitors in the reſpective courts, or by the lord or his ſteward in the leet, and the ſheriff in his torn, ſeemeth not clearly determined. 2 *Haw.* 62.

2. But by which of them ſoever they ſhall be choſen and appointed, it ſeemeth clear, that they *By whom to be ſworn.*

are to be ſworn and placed in their office, by the lord or his ſteward, or by the ſheriff reſpectively, as being judge of the court. 2 *Haw.* 62.

Cuſtom of chuſing.

3. Alſo it ſeems certain, that a cuſtom for chuſing a conſtable either way is good; and it ſeems to have been the opinion of the makers of the act of 13 & 14 C. 2. hereafter following, that the lords of the courts leet have this power of common right, and conſequently the ſheriff in his torn, where there is no court leet. 2 *Haw.* 93.

Anciently the practice was, that in every hundred where there was a feudal lord, the conſtables were ſworn in and admitted by the lord or his ſteward in his leet; but where there was no ſuch feudal lord, the ſheriff in his torn had the ſwearing and placing of them in: alſo if there was no feudal lord of the hundred, an annual officer was choſen, who was to preſide over the whole hundred, who was called the high conſtable; but if the hundred was feudal, as it often anciently was, then ſuch lord of the hundred adminiſtered the office himſelf. 1 *Bac. Abr.* Conſt. A.

Chuſing high conſtables.

4. But now the uſual manner is, that the high conſtables of hundreds be choſen either at the ſeſſions, or by the greater number of the juſtices of the diviſion; and likewiſe that they be ſworn at
*401 ſeſſions, or by warrant from * the ſeſſions; which courſe hath been often allowed and commended by the juſtices of aſſize. *Dalt.* c. 28.

And the reaſon thereof may be this, as hath been intimated above; namely, that their office at preſent doth not ſo much conſiſt in executing the office of high conſtable as ſuch, as in executing the juſtices precepts, which they may do for the moſt part, whether they be indeed high conſtables or not.

Petty conſtables appointed by juſtices of the peace.

5. And moreover, every petty conſtable, being a principal peace officer, and it being neceſſary for the preſervation of the peace, that every vill ſhould be furniſhed with one; the juſtices of the peace have ever ſince the inſtitution of their office, taken upon them as conſervators of the peace, not only to ſwear the petty conſtables, which have been choſen at a torn or leet, but alſo to nominate and ſwear thoſe who have not been choſen at any ſuch court, on the neglect of the ſheriffs or lords to hold their courts, or to take care that ſuch officers are appointed in them. And this power of juſtices of the peace having been confirmed by the uninterrupted uſage of many ages, ſhall not now be diſputed, but ſhall be preſumed to have been grounded on ſufficient authority. And ſome have carried this point ſo far, as to allow the juſtices at their ſeſſions, to ſwear one who was choſen at the leet, and unduly rejected by the ſteward, who had ſworn another in his place. 2 *Haw.* 65.

And

And in the case of *K.* and *Dr. Franchard*, H. 14 G. 2. Dr. *Franchard* was chosen constable of *Milborne Port* at the leet, which immediately adjourned; and he was afterwards sworn in by a single justice of the peace: And upon motion for an information as not being duly sworn, the court held this to be a good swearing. *Str.* 1149.

Where no constable hath been before.

6. M. 21 C. 2. The justices of the county of *Northampton*, at their general sessions chose a constable for *Holmby*; and for not coming in to take the oath, proceeded against him. Which proceedings being removed by certiorari into the king's bench, it was moved on affidavits that there had not been a constable there for 50 years before, that he might be discharged; alledging likewise, that *Holmby* was a privileged place, and that all the inhabitants were the duke of *York*'s tenants: But the court held, that they could not discharge him on motion, and said, that they must determine the matter by action of false imprisonment, or some other way; and inclined strongly that he could not any way be discharged: For, by the court, tho' originally constables were chosen in leets, yet the constable being an officer whose duty it is to keep the * peace, the justices may chuse him in cases of necessity; as in the hamlets about the tower, the justices, by reason of the increase of buildings, where there was formerly but one constable, did chuse five; and it was ruled they might do so; and they seemed to incline, that tho' formerly there had been none, yet they might chuse one if they should think it convenient. 1 *Bac. Abr.* Const. A. * 402

Where the leet shall make default.

7. However, it is certain, that justices of the peace had power to nominate and swear constables, on the default of the torn or leet, before the statute of 13 & 14 C. 2. c. 12. and therefore, that they have such authority in some cases not mentioned in that statute; which enacts, that if a constable shall die, or go out of the parish, any two justices may make and swear a new one, until the lord shall hold a leet, or till the next quarter sessions, who shall approve of the officer so made and sworn, or appoint another: and if any officer shall continue above a year in his office, the justices in their quarter sessions may discharge him, and put in another till the lord shall hold a court as aforesaid. 2 *Haw.* 65. 13 & 14 C. 2. c. 12. s. 15.

Mandamus to compel the swearing a constable.

8. And it seems to be clear at this day, that the king's bench hath power by mandamus to compel the court or judge to swear a constable duly chosen. 2 *Haw.* 65.

Constable refusing to be sworn.

9. Constables lawfully chosen, if they shall refuse to be sworn, a justice of the peace may bind them over to the assizes or sessions (there to be indicted.) *Dalt.* c. 28.

10. But

How punished.

10. But it seemeth that the sheriff, or steward of the leet, cannot lawfully commit them for such refusal, without more; but it is said, that if the party be present in the court, he may be fined; and that if he be absent, and have a certain time and place appointed him by the sheriff or steward, for the taking of the oath before a justice of the peace, and have also express notice of such appointment, and be presented at the next court, for having refused to take it accordingly, he may be amerced: also it seems, that in either case he may be indicted (A) either at the assizes or sessions. And it is advisable in all pleadings, in any action concerning such a fine or amerciament, and in all indictments for such refusal, especially and expressly to set forth the manner of every such election, appointment, notice, and refusal, and before whom the court was holden: and it hath been adjudged, that it is insufficient to say in general, that the party was duly elected, or lawfully elected, or that he had notice, without setting forth the special circumstances thereof. Also it is said to have been adjudged, that an indictment for not finding a sufficient person to serve the office of constable, without * shewing that the party refused to serve it himself, is insufficient. 2 *Haw.* 64.

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Constable's oath.

11. There is a long form of constable's oath, in *Dalton*, which is adopted by Mr. *Barlow*, expressing his duty in many instances; but as that form nevertheless doth not contain the hundredth part of the constable's duty, nor indeed the most material instances of it, it may be more eligible (as no particular form is directed by any statute) to swear him (B) to the due execution of his office in general, than to descend to those particulars; lest by mentioning some parts of his duty, and not others, he may be induced to think, that those others are not so necessary.

Oaths of allegiance and supremacy.

12. By the 1 G. st. 2. c. 13. High constables are to take the oaths of allegiance, supremacy, and abjuration, as other persons who qualify for offices; but they are not within the statute of the 25 C. 2. c. 2. as to receiving the sacrament, and subscribing the declaration against transubstantiation; and petty constables are exempted both from the one and from the other.

IV. His power as a conservator of the peace.

Constable a conservator of the peace.

1. Every high and petty constable are by the common law conservators of the peace. 2 *Haw.* 33. *Crom.* 6. *Dalt.* c. 1.

2. And

2. And therefore if any man ſhall make an affray or aſſault upon another in the preſence of the conſtable, or ſhall threaten to kill, beat, or hurt another, or ſhall be in a fury ready to break the peace; the conſtable may commit him to the ſtocks, or other ſafe cuſtody for the preſent, and after may carry him before a juſtice, or to gaol, until he ſhall find ſurety for the peace, which ſurety the conſtable himſelf may alſo take by obligation, to be ſealed and delivered to the king's uſe; and if the party will not find ſurety to the conſtable, he may impriſon the party until he ſhall do it. *Dalt.* c. 1. *May commit for an affray in his preſence.*

3. But he may not require ſurety of the peace, unleſs the offence be upon his own view, and not if it be committed out of his ſight; for he cannot take any man's oath that he is afraid of death, becauſe he is not a judge of record; which is the reaſon that an obligation taken by him ſhall be in his own name, and not in the king's name; and the ſame ſhall be certified in the ſeſſions of the peace. *Cro. Eliz.* 375, 376. *But not when he is abſent.*

* *V. His duty as a ſubordinate officer to juſtices of the peace.* *404

It hath always been holden, that the conſtable is the proper officer to a juſtice of the peace, and bound to execute his warrants; and therefore it hath been reſolved, that where a ſtatute authorizes a juſtice of the peace to convict a man of a crime, and to levy the penalty by warrant of diſtreſs, without ſaying to whom ſuch warrant ſhall be directed, or by whom it ſhall be executed, the conſtable is the proper officer to ſerve ſuch warrant, and indictable for diſobeying it. 2 *Haw.* 262. *Subordinate to the juſtices of the peace.*

VI. His indemnity and protection in his office.

1. If an action is brought againſt a conſtable for any thing done by virtue of his office; he, and alſo all others which in his aid, or by his command, ſhall do a thing concerning his office, may plead the general iſſue, and give the ſpecial matter in evidence, and if he recovers, he ſhall have double coſts. 7 J. c. 5. *Double coſts.*

2. And ſuch action ſhall be laid in the county where the fact was committed, and not elſewhere. 21 J. c. 12. *Proper county.*

3. Formerly

No action if he delivers a copy of the warrant.

3. Formerly the conſtable was bound to take notice of the juriſdiction of the juſtice: inſomuch that if the juſtice iſſued a warrant in any matter wherein he had no juriſdiction, the conſtable was puniſhable for the execution of it: but now, by the ſtatute of 24 G. 2. c. 44. it is enacted;

That no action ſhall be brought againſt any conſtable, or other perſon acting by his order, and in his aid, for any thing done in obedience to the warrant of a juſtice of the peace, until demand hath been made, or left at the uſual place of his abode, by the party, or by his attorney, in writing, ſigned by the party demanding the ſame, of the peruſal and copy of ſuch warrant, and the ſame hath been refuſed or neglected for ſix days after ſuch demand: and if after compliance therewith, any ſuch action ſhall be brought, without making the juſtice who ſigned ſuch warrant defendant, on producing and proving ſuch warrant at the trial, the jury ſhall give their verdict for the defendant, notwithſtanding any defect of juriſdiction in the juſtice. And if ſuch action be brought jointly againſt the juſtice and conſtable; on proof of ſuch warrant, the juſtice ſhall find for the conſtable, notwithſtanding ſuch defect of juriſdiction as aforeſaid;
*405 and if the verdict be given againſt * the juſtice, the plaintiff ſhall recover his coſts againſt him, to be taxed in ſuch manner by the proper officer, as to include ſuch coſts as the plaintiff is liable to pay to ſuch defendant, for whom ſuch verdict ſhall be found as aforeſaid. ſ. 6.

Note; By this it ſeemeth, that the conſtable ought not to return the warrant to the juſtice, but to keep it for his own juſtification; for he cannot grant to the party the peruſal of the warrant, unleſs he hath it: but he muſt certify to the juſtice what he hath done in the execution thereof.

No action but within ſix months.

4. And no action ſhall be brought againſt any conſtable, but within ſix months after the act committed. 24 G. 2. c. 44. ſ. 8.

Conſtable aſſaulted need not go back to the wall.

5. And if the conſtable is aſſaulted in the execution of his office, he need not go back to the wall, as private perſons ought to do: and if in the ſtriving together, the conſtable kills the aſſailant, it is no felony; but if the conſtable is killed, it ſhall be conſtrued premeditated murder. *Hale's Pl.* 37. 1 H. H. 457.

VII. Concerning the expences of his office.

Charges of making diſtreſs.

1. By the 27 G. 2. c. 20. The conſtable executing a juſtice's warrant, for levying a penalty, or other ſum of money directed by an act of parliament, by diſtreſs, may deduct his own reaſonable charges of taking, keeping,

keeping, and selling the goods distrained; returning the overplus on demand, after such penalty or sum of money and charges deducted.

Charges of conveying an offender to gaol.

2. A person committed to gaol, for any misdemeanor, shall bear his own charges (if able) for conveying or sending him to the said gaol, and the charges of those that guard him thither; and if he shall refuse at the time of commitment to defray the same, or shall not then pay the same, the justice committing him, shall by warrant to the high or petty constable where the person shall inhabit, or from whence he shall be committed, or where he shall have any goods within the county, order so much to be sold thereof, as by his discretion shall satisfy the same; the appraisement to be made by four honest inhabitants. 3 J. c. 10. s. 1.

And if he have not money nor goods within the county, sufficient to bear the charges of himself and of those who convey him to the gaol or house of correction, the constable may make application to a justice, who may upon oath * examine into and ascertain the reasonable expences, and shall by his warrant (without fee) order the treasurer to pay the same; except in *Middlesex*, where the same shall be paid by the overseers of the parish where the person was apprehended. 27 G. 2. c. 3. *406

Charges in the business of the parish.

3. And by the 18 G. 3. c. 19. Whereas constables, head-boroughs, and tithingmen, are or may be at great charge in doing the business of their parish, township, or place, and in many cases are not sufficiently indemnified by law; it is therefore enacted, that every constable or other such officer shall every three months, and within 14 days after he shall go out of his office, deliver to the overseers a just account in writing, fairly entered in a book to be kept for that purpose, and signed by him, of all sums so by him expended on account of the said parish, township, or place, in all cases not hitherto provided for by law, and also of all sums received by him on the account of the said parish, township, or place; and the overseers shall, within the next 14 days after the account shall be so delivered, lay the same before the inhabitants, and if approved by the majority of them, the overseers shall pay out of the poor rate such sum as shall appear to be due on the said account: But if the account, or any part thereof, shall be disallowed, the overseers shall deliver back to the constable or other officer such book of accounts; who may then produce the said book to a justice, giving reasonable notice thereof to the overseer; which justice shall examine the same, and hear and determine any objection that shall be made to the account, and settle the sum which shall appear to him to be due, and enter the same in the account, and sign his name thereto; and the overseers shall pay the same accordingly. s. 4.

Provided, that if the overseer shall find that the parish, township, or place is aggrieved by any thing done or omitted by the said con-

ſtable or other officer, or by the juſtice; or ſhall have any material objection to the account, or to ſuch determination as aforeſaid; he may, giving reaſonable notice to the ſaid juſtice, conſtable, or other officer, appeal to the next general or quarter ſeſſions for the county or liberty where ſuch pariſh, townſhip, or place lies; who ſhall hear and finally determine the ſame: But if it ſhall appear to the juſtices that reaſonable notice was not given, they ſhall adjourn the appeal to the next quarter ſeſſions. And the juſtices may order to the party for whom the appeal ſhall be determined reaſonable coſts, in like manner as concerning ſettlements by the 8 & 9 c. 30.—Provided, * that in corporations which have not four juſ- *407 tices, the overſeer may appeal, if he thinks fit, to the ſeſſions of the county. ſ. 5, 6.

And the juſtices in ſeſſions may from time to time lay down or alter ſuch rules and regulations as to any coſts or charges to be allowed to any perſon by virtue of this act, as to them ſhall ſeem juſt: which rules and regulations, having received the approbation and ſignature of one or more of the judges of aſſize, ſhall be binding, and not otherwiſe, on all perſons whatſoever. ſ. 9.

VIII. Concerning his account and removal from his office.

Account. 1. The high conſtables ſhall at the general or quarter ſeſſions, if thereunto required, account for the general county rate by them received; on pain of being committed to gaol until they ſhall account; and ſhall pay over the money in their hands, according to the order of the ſaid court, on the like pain: And all their accounts and vouchers ſhall, after having been paſſed at the ſaid ſeſſions, be depoſited with the clerk of the peace, to be kept amongſt the records, and inſpected by any juſtice without fee. 12 G. 2. c. 29. ſ. 8.

Removal. 2. And in ſuch manner as conſtables are to be choſen, in the ſame manner, and by the like authority, are they to be removed; ſo as if there ſhall be cauſe to remove and put an high conſtable from his place, it hath not been thought fit, that any one or two juſtices ſhould do it upon their diſcretion, but that it ſhould be done by the greater part of the juſtices of that diviſion, and that for ſome juſt cauſe; or elſe that it be done at the ſeſſions. *Dalt.* c. 28.

And it ſeems clear, that the ſheriff or ſteward of the leet, having power to place a conſtable in his office, have by conſequence a power of removing him. 2 *Haw.* 63.

And alſo the juſtices of the peace have alſo uſed, for good cauſe, to diſplace all ſuch conſtables as have been choſen and ſworn by them. 2 *Haw.* 65.

And

And by the 13 & 14 C. 2. c. 12. If a conſtable ſhall continue above a year in his office, the ſeſſions may diſcharge him, and put another in his place, till the lord ſhall hold a leet. ſ. 15.

And if the court, or other judge, ſhall refuſe to diſcharge a conſtable, the king's bench may compel them by *mandamus*. 2 *Haw.* 65.

* A. Indictment for not taking the office. *408

THE *jurors of our lord the king upon their oath preſent, that* A. O. *late of* ——— *in the townſhip of* ——— *in the ſaid county, yeoman, on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— *and long before, and always after until the day of the preferring of this indictment, was and is an inhabitant and reſiding within the townſhip of* ——— *aforeſaid, in the county aforeſaid, and an able perſon to ſerve the office of conſtable for the ſaid townſhip; and he the ſaid* A. O. *on the ſaid* ——— *day of* ——— *in the year aforeſaid, in the townſhip aforeſaid, at the court leet of* A. L. *lord of the manor of* ——— *aforeſaid, holden before* A. S. *gentleman, ſteward of the ſaid court, by the ſuitors of the ſaid court, was elected and choſen, according to the ancient cuſtom of chuſing conſtables for the ſaid townſhip, for one year from thence next following, to do and execute all and ſingular thoſe things which belong to the office of conſtable;* [or otherwiſe as the cuſtom ſhall be for chuſing conſtables:] *and that the ſaid* A. O. *afterwards, to wit, on the* ——— *day of* ——— *in the year aforeſaid, at the townſhip of* ——— *aforeſaid, had due notice given to him by* A. B. *bailiff of the aforeſaid manor, of his being ſo elected and choſen conſtable as aforeſaid, and then and there was by him the ſaid* A. B. *required to appear before* J. P. *eſquire, then and yet one of his majeſty's juſtices aſſigned to keep the peace within the ſaid county, and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in the ſaid county committed, on the ſaid* ——— *day of* ——— *in the year aforeſaid, to take his oath for the due executing the ſaid office of conſtable for the ſame townſhip, according to the duty of that office; nevertheleſs the ſaid* A. O. *his duty in that behalf not regarding, but contriving and intending wholly to neglect to ſerve the ſaid office of conſtable, after he the ſaid* A. O. *was ſo elected and choſen into the ſaid office as aforeſaid, to wit, on the ſaid* ——— *day of* ——— *in the year aforeſaid, and continually afterwards until the day of taking this inquiſition, at the townſhip aforeſaid, in the county aforeſaid, unlawfully and contemptuouſly did refuſe, and ſtill doth refuſe, to take his ſaid oath for the due executing the ſaid office of conſtable, and in any wiſe to execute the ſame office, to the great hindrance of juſtice, in contempt of our ſaid lord the king, and to the evil example of all others in the like caſe offending, and againſt the peace of our ſaid lord the king.*

B. Conſtable's oath.

*409 YOU *ſhall well and truly ſerve our ſovereign lord the king,* [*and the lord of this leet,* if ſworn in a court * leet] *in the office of conſtable, for the townſhip of* ——— *for the year enſuing, according to the beſt of your ſkill and knowledge: So help you God.*

CONVICTION.

THE power of a juſtice of the peace is in reſtraint of the common law, and in abundance of inſtances is a tacit repeal of that famous clauſe in the great charter, that a man ſhall be tried by his equals; which alſo was the common law of the land long before the great charter, even for time immemorial, beyond the date of hiſtories and records. Therefore generally nothing ſhall be preſumed in favour of the office of a juſtice of the peace; but the intendment will be againſt it. Therefore where a ſpecial power is given to a juſtice of the peace by act of parliament to convict an offender in a ſummary manner, without a trial by jury, it muſt appear that he hath ſtrictly purſued that power; otherwiſe the common law will break in upon him, and level all his proceedings. Therefore where a trial by jury is diſpenſed withal, yet he muſt proceed nevertheleſs according to the courſe of the common law in trials by juries, and conſider himſelf only as conſtituted in the place both of judge and jury. Therefore there muſt be an information or charge againſt a perſon; then he muſt be ſummoned or have notice of ſuch charge, and have an opportunity to make his defence; and the evidence againſt him muſt be ſuch as the common law approves of, unleſs the ſtatute ſpecially directeth otherwiſe; then, if the perſon is found guilty, there muſt be a conviction, judgment, and execution, all according to the courſe of the common law, directed and influenced by the ſpecial authority given by ſtatute; and in the concluſion, there muſt be a *record* of the whole proceedings, wherein the juſtice muſt ſet forth the particular manner and circumſtances, ſo as if he ſhall be called to account for the ſame by a ſuperior court, it may appear that he hath conformed to the law, and not exceeded the bounds preſcribed to his juriſdiction.

The

CONVICTION.

The difficulty of drawing up a conviction in due form, hath induced the legiſlature to inſtitute a more apt and compendious method in divers inſtances; and it were to be wiſhed, in eaſe of the juſtices, that this proviſion might be made more general. Theſe ſummary forms of convictions, which are ſpecially directed by act of parliament, * are interſperſed throughout this book under the titles to which they do reſpectively belong. *410

Other forms of convictions, which are left at large according to the courſe of the common law (having no preſcriptive form of words directed by any act of parliament) are likewiſe drawn forth at length under divers titles; particularly, concerning ſuch matters as have been often controverted in the courts above, occaſioned either by the largeneſs of the penalties, or ſometimes by the greatneſs of the offenders; as in caſes of riots, forcible entries, game deſtroying, and ſuch like.

It remaineth, under this title, to inſert one general precedent or form of conviction for the whole; which may be to the effect following:

General form of conviction.

Weſtmorland. BE *it remembred, that on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— *by the grace of God, of* Great Britain, France *and* Ireland, *king, defender of the faith, and ſo forth, at* ——— *in the county of* ——— *aforeſaid,* A. I. *of* ——— *cometh before me* I. P. *eſquire, one of the juſtices of our ſaid lord the king, aſſigned to keep the peace of our ſaid lord the king in the ſaid county, and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in the ſaid county committed,* [*reſiding near to the place where the offence herein after mentioned was committed*; or as the ſtatute requires] *and giveth me the ſaid juſtice to underſtand and be informed, that one* A. O. *of* ——— *in the ſaid county, yeoman, on the* ——— *day of* ——— *now laſt paſt, at* ——— *in the ſaid county, did* [here ſet forth the fact, in the words of the ſtatute as near as may be] *againſt the form of the ſtatute in ſuch caſe made and provided: and afterwards, upon the aforeſaid* ——— *day of* ——— *in the year aforeſaid, at* ——— *aforeſaid, in the county aforeſaid, he the ſaid* A. O. *after being duly ſummoned in this behalf before me, the juſtice aforeſaid, appeareth and is preſent, in order to make his defence againſt the ſaid charge contained in the ſaid information, and having heard the ſame, he the ſaid* A. O. *is aſked by me the ſaid juſtice, if he can ſay any thing for himſelf, why he the ſaid* A. O. *ſhould not be convicted of the premiſſes above charged upon him in form aforeſaid; who pleadeth that he is not guilty of the ſaid offence. Nevertheleſs on the* ——— *day of* ——— *aforeſaid, in the year aforeſaid, at* ——— *aforeſaid, in the county aforeſaid, one credible witneſs, to wit,*

wit, A. W. *of* ——— *yeoman, cometh before me the juſtice aforeſaid, and before me the ſame juſtice upon his oath on the holy goſpel to him*
*411 *then and there by me the juſtice aforeſaid adminiſtered, depoſeth, ſweareth, and on his oath aforeſaid affirmeth and ſaith, that the aforeſaid* A. O. *on the* ——— *day of* ——— *aforeſaid, in the year aforeſaid, at* ——— *aforeſaid, in the county aforeſaid, did* [here again ſet forth the fact, or ſo much thereof as is ſufficient to convict the offender.] *And thereupon the aforeſaid* A. O. *the* ——— *day of* ——— *aforeſaid, in the year aforeſaid, before me the juſtice aforeſaid, by the oath of one credible witneſs aforeſaid, according to the form of the ſtatute aforeſaid is convicted: and for his offence aforeſaid hath forfeited the ſum of* ——— *of lawful money of* Great Britain, *to be diſtributed as the ſtatute aforeſaid doth direct. In witneſs whereof, I the ſaid juſtice to this preſent record of the conviction as aforeſaid, have ſet my hand and ſeal at* ——— *aforeſaid, in the county aforeſaid, the day and year firſt above-written.*

If he confeſſes the fact then ſay,——— *And becauſe the ſaid* A. O. *hath nothing to ſay, nor can ſay any thing in his own defence touching and concerning the premiſſes aforeſaid, but doth of his own accord freely and voluntarily acknowledge and confeſs all and ſingular the ſaid premiſſes to be true, in manner and form as the ſame are charged upon him in the ſaid information: and becauſe all and ſingular the premiſſes being heard and fully underſtood by me the ſaid juſtice, it manifeſtly appears to me* ——— Or, if the party hath been ſummoned, and doth not appear, then ſay, ——— *Whereupon, on the ſaid* ——— *day of* ——— *in the year aforeſaid, at* ——— *aforeſaid, in the county aforeſaid, he the ſaid* A. O. *was duly ſummoned in this behalf, to appear before me, in order to make his defence againſt the ſaid charge contained in the ſaid information, but the ſaid* A. O. *doth neglect to appear before me, and doth not appear, nor make any defence againſt the ſaid charge as aforeſaid: Therefore I the ſaid juſtice, on the ſaid* ——— *day of* ——— *in the year aforeſaid, at* ——— *aforeſaid, in the county aforeſaid, do proceed to examine into the truth of the ſaid complaint; And* A. W. *of* ——— *a credible witneſs cometh before me the juſtice aforeſaid, and before me the ſame juſtice upon his oath*, &c.

Cometh before me] A conviction ought to be in the preſent tenſe, and not in the time paſt. L. *Raym.* 1376. *Str.* 608. *Roberts*'s caſe.

And giveth me to underſtand and be informed] A conviction ought to be on an information or complaint precedent. M. 11 *W. K.* and *Fuller*. L. *Raym.* 510.

That one A. O. *of* ——— *in the ſaid county, yeoman*, &c. All acts which ſubject men to new and other trials, than thoſe by which they ought to be tried by the common law, ought to be taken ſtrictly;
*412 and the court of king's bench * will require, that it do appear upon the face of ſuch proceedings, that the fact was an offence within the act, and that the juſtices have proceeded accordingly. M. 1. An. *K.* and *Chandler*. 1 Salk. 578. L. Raym. 581.

Therefore

Therefore the particular manner of the offence ought to be ſet forth. Thus in the caſe of ſwearing, before the legiſlature by the act of the 19 G. 2. had directed a ſummary form of words, for the conviction, it was required not only to ſet forth that the perſon had curſed or ſworn in general, but the particular oaths and curſes were to be ſet forth, that the court might judge thereupon, whether they were indeed oaths and curſes or not. *H.* 8 *G. K.* and *Sparling.* Str. 497.

And in the caſe of *K.* and *Roberts*, *M.* 11 *G.* which was a conviction for ſwearing 150 oaths in theſe words *by God*, and curſing 150 curſes, in theſe words *God damn you*, this matter was carried ſo far, that it was inſiſted this was not ſufficient, but that the oaths and curſes ought to have been ſet forth 150 times each. But the oaths and curſes being all only in the ſame words over again, the court held the conviction good. *Str.* 608. L. *Raym.* 1376.

And it ſeemeth, that a conviction on a penal ſtatute ought expreſsly to ſhew, that the defendant is not within any of its proviſoes; for ſince no plea can be admitted to ſuch a conviction, and the defendant can have no remedy againſt it, but from an exception to ſome defect appearing in the face of it, and all the proceedings are in a ſummary manner, it is but reaſonable that ſuch a conviction ſhould have the higheſt certainty, and ſatisfy the court, that the defendant had no ſuch matter in his favour, as the ſtatute itſelf allows him to plead. 2 *Haw.* 250.

But in the caſe of *K.* and *Ford*, *T.* 9 *G.* There was a conviction on the 3 *C. c.* 3. for keeping an alehouſe without licence; and it was objected, that in the act there was a proviſo to exempt perſons who had been puniſhed by the former law of the 5 & 6 *Ed.* 6. c. 25. and therefore it ſhould have been ſaid, he had not been proceeded againſt upon that act: But by the court, That coming in by way of proviſo, he ſhould have inſiſted on it in his defence; it appears he was aſked what he had to ſay, and therefore we may reaſonably preſume he had no ſuch defence to make. And the conviction was confirmed. *Str.* 555.

And in the caſe of *K.* and *Bryan*, *M.* 12 *G.* 2. The defendant was convicted on the gin act; and an exception was taken, that there was no averment, that it was not ſold to be uſed in medicine: and the caſes on the game * act were mentioned, where in convictions it is neceſſary to exclude all the qualifications for killing game. On the other hand, it was inſiſted, that the reaſon of that was, becauſe thoſe were in the enacting clauſe, whereas this about medicine comes in by way of proviſo, and is by way of defence to be ſhewn on the defendant's part: and for that purpoſe was cited, *M.* 11 *G. K.* and *Theed*; where in a conviction for obſtructing an exciſe officer on the 8 *Ann. c.* 9. it was objected, that it not being averred to be in the day, it ſhould have been ſhewn that there was a conſtable preſent, which is made neceſſary in the night: but was held to be well, and its being in the night ſhould have been ſhewn

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on

on the defendant's part. And by the court, This is brought within the general enacting clauſe: and the true diſtinction is, where the extenuation comes in by way of proviſo or exception. And the conviction was confirmed. *Str.* 1101.

At ——— in the ſaid county] *E.* 26 *G.* 3. *K.* v. *Jeffries.* This was a conviction on the lottery act, 22 G. 3. c. 47. The information charged, that on the 10th *March* 1786, *Thomas Jeffries* did, in *Great Queen's Street*, in the pariſh, &c. take and receive of *Thomas Jackſon*, 2s 9d; and in conſideration thereof, did agree to pay to him one guinea, if No 18,433 ſhould be drawn on the 30th day of drawing the lottery. The evidence was, "That on the 10th *March* laſt, *Jackſon* inſured perſonally with the ſaid *Jeffries* the ſaid ticket, and paid 2s 9d to receive one guinea if drawn blank or prize on the 30th day of drawing."—*Erſkine* objected, that the evidence did not prove the offence to be committed in the place laid in the information, which it ought to have done; for wherever the juriſdiction of the magiſtrates who try the offence is local, the offence muſt be proved to have been committed within their juriſdiction. And of this opinion was the court. Conv. quaſhed. *Caſ.* by *Durnf.* and *Eaſt.* 241.

Being duly ſummoned] *T.* 11 *G. K.* and *Venables.* The court were unanimouſly of opinion, that the party ought to be heard, and for that purpoſe ought to be ſummoned in fact; and that if the juſtices proceeded againſt a perſon without ſummoning him, it would be a miſdemeanor in them, for which an information would lie. L. *Raym.* 1406.

And in the caſe of *K.* and *Allington*, *H.* 12 *G.* On affidavit that no ſummons was had, the court granted an information againſt the juſtice who made the conviction. *Str.* 678.

*414 **H.* 6 *G. K.* and *Johnſon.* The defendant was convicted for keeping a gun. And exception was taken, that there was not a *reaſonable* ſummons; for it was made to appear the ſame day, which might be impoſſible upon account of the diſtance, or the ſummons being ſerved late, and his witneſſes might not be got together on ſo ſhort a warning: then it was to appear *at the pariſh aforeſaid*, whereas there were two pariſhes mentioned before; ſo the man might have gone to one, whilſt they were convicting him at the other. It was anſwered, that the defendant appeared at the time, and made defence; ſo that cures all defects in the ſummons. And by the court, The anſwer is right. *Str.* 261.

H. 3 *G. K.* and *Simpſon.* The defendant was convicted for deerſtealing; and the conviction ſet forth, that he had been ſummoned to appear before the juſtices, but it did not appear he ever was before them. Exception was taken to this, that as no appeal lies in this caſe, the juſtices ſhould have not proceeded in the abſence of the party, eſpecially where it may end in a corporal puniſhment, as

as it may do here for want of a diſtreſs. And at another day, on conſideration, *Parker* C. J. delivered the reſolution of the court: We are all of opinion, the offender may be convicted, without appearing. The ſtatute is ſilent as to the method of proceeding, and the law of *England*, it is true, in point of natural juſtice, always requires the party charged with any offence, to be heard before he be condemned in judgment; but that rule muſt have this exception, unleſs it is through his own default; were it otherwiſe, every criminal might avoid conviction. *Str.* 44.

But, generally, it is not neceſſary to *ſet forth the ſummons in the conviction*; for although no ſummons is ſet forth, yet the court will intend one: but where a ſummons is ſet forth, and that ſummons appears to be irregular, the court will quaſh the conviction, there being then no room to intend any other ſummons. 11 *G. K.* and *Venables.* 1 Seſſ. C. 210. L. Raym. 1405.

One credible witneſs, to wit, A. W. *of* ——— *yeoman*] It is requiſite to name the witneſs, that it may appear he is not the ſame perſon who was the informer; for an informer who hath a ſhare of the penalty, is never allowed to be a witneſs, unleſs in caſe where a ſtatute ſhall ſpecially ſo direct it.

*415

On his oath aforeſaid affirmeth and ſaith] In all convictions, being in the nature of judgments, the whole * evidence ought to be ſet forth, or at leaſt ſo much thereof as is ſufficient to warrant the conviction; that the court of king's bench may judge of the ſufficiency thereof: but otherwiſe it is in orders which are authoritative. And ſo it was laid down in the caſe of *K.* and *Floyd, M.* 8. *G.* 2. which was thus; A motion was made to quaſh an order of ſeſſions, made under the ſtatute of the 1 *W. c.* 21. *ſ.* 6. whereby the defendant was adjudged guilty *upon full proof* of the charge againſt him, and that he be diſcharged from his office of clerk of the peace, upon the objection that the evidence is not ſet out: but it was adjudged after conſideration that this was an order, and therefore the evidence need not be ſhewn: but that it would be otherwiſe if it was a conviction. *Andr.* 82. *Str.* 996.

M. 5 *G.* 2 *K.* and *Theed.* A conviction on the candle act was quaſhed, becauſe the evidence was not ſet out; it being only alledged, that the offence was *fully and duly proved.* Str. 919. 2 Barnard, 16, 73.

T. 6 *G. K.* and *Baker.* A conviction for taking pilchards againſt the form of the ſtatute, quaſhed; becauſe the witneſs ſwears generally that the defendant *is guilty of the premiſſes*, and that is taking upon himſelf to ſwear the law. *Str.* 316.

E. 1 *G.* 3. *K.* againſt *Vipont* and others. The conviction as, that the defendants, *having heard the charge*, (of conſpiring to advance their wages in the woollen manufacture), and being called

upon by the juſtices to ſhew cauſe why they ſhould not be convicted, and having nothing to ſay whereby to defend themſelves, are therefore convicted: And quaſhed by the court; becauſe the evidence ought to be particularly ſet forth, that the court may judge thereof; and it muſt be given in preſence of the defendant, that he may have an opportunity of croſs-examination. *Burrow, Manſfield.* 1163.

E. 7 *G.* 3. *K* and *Killett.* The defendant, being a clergyman, was convicted for neglecting to read the act againſt profane curſing and ſwearing. The conviction fully ſet forth the offence as charged in the information; and then goes on, ſetting forth that the defendant was ſummoned, and having neglected to appear, the juſtice proceeded to examine into the truth of the charge, *and the ſame, as ſet forth, being duly proved before him,* he adjudges the defendant guilty. By the court: It is now fully ſettled, that upon a conviction the evidence ought to be ſet out, that the court may judge whether the juſtices have done right; but upon an order it is not neceſſary. *Burr. Manſf.* 2063.

*416 * *And for his offence aforeſaid*] *E.* 26 *G.* 3. *K.* v. *Solomons.* This was a conviction on the lottery act 22 *G.* 3. *c.* 47. The information as ſet forth in the conviction was, "that *Solomons* did keep an "office for dealing in ſhares of lottery tickets without a licence; "and alſo did keep an office for regiſtering the numbers of lottery "tickets without a licence, &c." and the ſaid *Solomons* was thereupon convicted *of the ſaid offence charged upon him,* in and by the ſaid information, &c. according to the form of the ſtatute, &c. for which *ſaid offence* he was adjudged to have forfeited 1 col.—By the *court:* The conviction is bad, for there is a duplicity of charge; the defendant is charged with *dealing in ſhares of lottery tickets,* and with *regiſtering tickets without licence*; and he is convicted of the *ſaid* offence, ſo that it does not appear of which offence he is convicted. A conviction muſt be good in all its parts; the information muſt be ſupported by the evidence, and the judgment muſt be ſupported by both. Here the defendant is charged with two diſtinct offences, each of which would ſubject him to a ſeparate penalty; and ſuppoſing they could have been included in one conviction, which is to be doubted, the defendant ſhould have been convicted of both. A judgment for too little is as bad as a judgment for too much. Conv. quaſhed. *Caſ.* by *Durnf.* and *Eaſt.* 249.

And for his offence aforeſaid hath forfeited]. *H.* 3 *G.* 2. *K.* and *Hawkes.* A conviction for killing a deer was quaſhed, becauſe it was only ——— *he is convicted,* without any judgment of forfeiture. *Str.* 858.

And in the aforeſaid caſe of the *King* againſt *Vipont* and others, the conviction *not adjudging the forfeiture,* was for that reaſon, as well as the other above mentioned, determined to be ill; eſpecially as the ſtatute upon which the conviction was made, leaves the judgment diſcretionary concerning the duration of the puniſhment, the offender being to be impriſoned by the juſtices for any time not exceeding three months. *Burrow, Mansfield.* 1163.

To

To be distributed as the statute aforesaid doth direct] M. 9 An. *K.* and *Barret.* A conviction for deer stealing did set forth, that —— *he is convicted and shall forfeit* 30*l*, *according to the form of the statute*, without making a distribution, which ought to be 10*l* to the informer, 10*l* to the party grieved, and 10*l* to the poor. But by the court, This is well enough; for by the statute he is only to forfeit in case he has goods, which is conditional, and not absolute. 1 *Salk.* 383.

*M. 28 G. 3. *K.* v. *Dimpsey*, *Potts*, and others. The defendants *417 were severally convicted before three justices, for refusing to receive soldiers regularly quartered and billetted upon them. These convictions were removed by *certiorari*, for the purpose of taking the opinion of the court upon the construction of the mutiny act, whether alehouse-keepers are bound to take in horses as well as soldiers. But as there was a decisive objection to the form of the convictions, the general question was not discussed. Each of the convictions concluded as follows: "And we do adjudge, that for the offence "aforesaid, he the said defendant hath forfeited the sum of 5*l* of "lawful money of Great Britain, to be disposed of as the law di-"rects."—*Law* objected, That there was no distribution of the penalty by the justices. The penalty is directed to be applied, in the first place, to make satisfaction to the soldier for any expence he may have been put to, by reason of his not being billetted as the justices shall direct, and the remainder is to be paid to the poor of the parish. He admitted, that where the statute distributes the penalty in certain proportions, it need not be distributed by the justices in the conviction; but where it is discretionary in the justices to distribute the penalty in such proportions as they shall direct, that distribution must appear upon the conviction itself.—*Erskine contra.* The justices were not bound to set forth in the conviction the manner in which they have exercised their discretion as to the distribution of the penalty. At the time of the conviction the penalty is not levied, and *non constat* that it ever will; so that it is impossible to distribute it till it is raised. It may be done at a subsequent time, and the court will not presume that the justices will not do their duty.—*Per Curiam:* A judgment is an entire thing; and one part of it cannot be given at one time, and another at a subsequent period. The distribution of the penalty is part of the judgment, and it ought to appear on the record. Conv. quashed. *Cas.* by *Durnf.* and *East.* v. 2. 96.

After all; these convictions, being tedious and troublesome, are never drawn up in form, till occasion calls them forth; as if they be to be recorded at the sessions, or removed into a higher court by *certiorari*.

Note; On a suggestion that the defendant hath a title to the thing in question, a prohibition will be granted by the king's bench, before or after conviction, to stay the justice from proceeding; for

without doubt, if the defendant have but a colour of title, the juſtices have no juriſdiction in the cauſe, as where the defendant was
*418 convicted * for cutting trees, where he had a right of common. *L. Raym.* 901.

CORDAGE FOR SHIPPING.

Short chucking, &c. not to be uſed in making cordage for ſhipping.

BY the 25 G. 3. c. 56. No perſon, after 25th *July* 1785, ſhall uſe, in the making of *cables*, *hawſers*, or other ropes for the uſe of ſhipping, or knowingly ſell the ſame, in the manufacturing whereof there ſhall have been uſed any hemp, uſually known by the names of ſhort chucking, half clean, whale line, or other topping, cordilla, damaged hemp bought at publick or other ſales, or any hemp from which the ſtaple part thereof ſhall have been taken away by the manufacturer; on pain of forfeiting (if he be the manufacturer thereof) ſuch cable, hawſer, or other rope, and treble the value thereof; and if the vender (and not the manufacturer), he ſhall forfeit a ſum equal to treble the value thereof. ſ. 2.

Cordage to be diſtinguiſhed as ſtaple and inferior.

And for the better diſtinguiſhing the quality of ſuch ropes, whenever the ſame ſhall be manufactured in whole or in part, the uſe whereof is not prohibited by this act, and the quality whereof ſhall be inferior to clean *Peterſburgh* hemp, the ſame ſhall be deemed *inferior cordage*, and the maker ſhall diſtinguiſh the ſame by running from end to end thereof, three tarred-mark yarns, ſpun with turn contrary to that of rope yarn, and alſo one like tarred yarn in every other rope for the uſe of ſhipping; and ſhall mark or write on a tally to be affixed thereon, the word *ſtaple* or *inferior* (as the caſe ſhall be), and alſo his name ſigned by himſelf or his attorney, together with the name of the place where manufactured; and in default thereof every ſuch manufacturer ſhall forfeit 10s for every hundred weight. ſ. 3, 4.

Penalty on putting a falſe name to cordage.

And if any ſuch rope-maker ſhall wilfully or knowingly permit or ſuffer his name to be put as aforeſaid to any ſuch ropes, not being of his own proper manufacturing; or if the vender or proprietor of any ſuch ropes, or any other perſon whatſoever wilfully and knowingly mark upon the tally affixed thereon, the name of any perſon not being the manufacturer thereof, he ſhall forfeit 20l. ſ. 5.

And

And if any perſon ſhall make any cables of any old or worn ſtuff, which ſhall contain above 7 inches in compaſs, he ſhall forfeit four times the value thereof. ſ. 6. *Penalty on making cables of old ſtuff.*

* And when any ſhip belonging to any of his majeſty's ſubjects reſident in *Great Britain* or in the *Britiſh Colonies*, ſhall come into any port in this kingdom, the maſter at the time of making his entry at the cuſtom houſe, ſhall make entry on oath of all foreign made cordage on board for which no duties have been paid (ſtanding and running rigging in uſe excepted); and ſuch maſter ſhall, before ſuch ſhip be cleared inwards, where any diſcharge ſhall be made of her lading, pay for ſuch foreign made cordage as ſhall be ſpecified or mentioned in the ſaid entry, the like duties as by the laws now in being are charged upon foreign made cordage imported into this kingdom; and if ſuch maſter ſhall make default herein, ſuch foreign made cordage on board ſuch ſhip ſhall be forfeited, and he ſhall alſo forfeit 20s for every hundred weight thereof. ſ. 8. *Importing cordage.* *419

But the ſame ſhall not extend to cordage brought from the *Eaſt Indies*; nor to the materials at preſent in the uſe of any ſhip built abroad before the paſſing of this act the property of any *Britiſh* ſubject. ſ. 9, 10.

All pecuniary penalties or forfeitures by this act impoſed exceeding 5l, are to be recovered in the courts at *Weſtminſter*; if not exceeding 5l, the ſame may be levied by diſtreſs, by one juſtice, on the oath of *two* witneſſes; and if ſufficient diſtreſs cannot be found, ſuch juſtice ſhall commit the offender to the common gaol or houſe of correction for any time not exceeding three calendar months, nor leſs than ſeven days, or until ſuch penalty and all coſts and charges ſhall be paid. And all ſuch penalties and forfeitures, and alſo all cordage which ſhall be forfeited, ſhall be paid and delivered to the perſon who ſhall ſue, who may ſell or otherwiſe diſpoſe of ſuch cordage (after being cut into lengths not exceeding 12 feet) to his own uſe. ſ. 7. *Penalties how to be recovered and applied.*

Provided always, that if any perſon ſhall think himſelf aggrieved by any thing done in purſuance of this act, and for which no particular method of relief is appointed, he may within four months after ſuch matter ſhall have been done, appeal to the ſeſſions, giving 14 days notice in writing of his intending to appeal, and the matter thereof, to the perſon appealed againſt, and within four days after giving ſuch notice, entering into recognizance before ſome juſtice with two ſureties, to try ſuch appeal, and abide the order, and pay ſuch coſts as ſhall be awarded at ſuch ſeſſions: and on due proof of ſuch notice, and entering into ſuch recognizance as aforeſaid, the juſtices at ſuch ſeſſions ſhall hear and finally determine ſuch appeal, and * award ſuch coſts as they ſhall *Appeal.* *420

ſhall think proper; which determination ſhall be final and concluſive. ſ. 11.

Proceedings not to be quaſhed nor diſtreſs deemed unlawful for want of form.

And no order, verdict, judgment, or other proceeding, ſhall be quaſhed for want of form only, or be removed by *certiorari* or other writ into any other court; and ſuch diſtreſs ſhall not be deemed unlawful, or perſon making the ſame a treſpaſſer on account of any defect or want of form in the proceedings; nor ſhall the party diſtraining be deemed a treſpaſſer *ab initio* on account of any irregularity which may afterwards be done by the party diſtraining; but the perſon aggrieved may recover ſpecial damage in an action upon the caſe, but no plaintiff ſhall recover in ſuch action, if ſufficient tender of amends hath been made before ſuch action brought. ſ. 12. Vide 26 G. 3. c. 85.

CORN.

I. The meaſure of corn.
II. Cutting corn growing, or burning ſtacks of corn.
III. Aſcertaining the prices of corn.
IV. Importation of corn.
V. Exportation of corn.

I. The meaſure of corn.

Buying corn in the ſheaf without meaſuring.

1. TO buy or ſell corn in the ſheaf, before it is threſhed and meaſured, is againſt the common law of *England*; and the reaſon thereof ſeemeth to be, for that by ſuch ſale the market is in effect foreſtalled. 3 Inſt. 197.

Penalty of ſelling otherwiſe than by Winchester *meaſure.*

2. If any perſon ſhall ſell corn otherwiſe than by *Wincheſter* meaſure ſealed and ſtricken by the brim, he ſhall forfeit 40s, on conviction before one juſtice, on the oath of one witneſs; to be levied by the churchwardens and overſeers, or ſome of them, to the uſe of the poor, by diſtreſs and ſale.

In

In default of diſtreſs, impriſonment till paid. 22 C. 2. c. 8. ſ. 2.

And if any mayor, or other head officer, ſhall knowingly permit the ſame, he ſhall upon conviction thereof at the county ſeſſions, forfeit 5l, half to the proſecutor, and half to the poor, by diſtreſs and ſale; for want of * diſtreſs, to be impriſoned by warrant of the * 421
juſtices, till payment be made. ſ. 3.

3. And moreover every perſon who ſhall ſell or buy corn, without meaſuring, being thereunto required, or in any other manner than is by the 22 C. 2. c. 8. directed, and that without ſhaking of the meaſure by the buyer, he ſhall, beſides the penalty of that act, forfeit all the corn ſo bought or ſold, or the value thereof, to the party complaining. 22 & 23 C. 2. c. 12. ſ. 2. *Further penalty.*

And on complaint made to a juſtice of the peace, that corn hath been bought, ſold, or delivered contrary to this act, the proof ſhall lie upon the defendant, to make it appear by the oath of one witneſs, that he ſold or bought the ſame lawfully: wherein if he ſhall fail, he ſhall forfeit as is ſaid before, to be levied by diſtreſs and ſale; which ſhall by the juſtice be diſtributed, half to the poor, and half to the informer. 22 & 23 C. 2. c. 12. ſ. 3.

4. But notwithſtanding all the ſtatutes that have been made, for the uniformity of meaſures throughout the realm, yet the meaſure of corn differs in many places, the buſhel being greater in one place than in another. And altho' regularly a cuſtom or preſcription againſt a ſtatute is void, except it be confirmed by the ſtatute, or ſaved by another ſtatute; yet it is ſaid, that in the meaſure of corn, the cuſtom of the place is to be obſerved, if it be a cuſtom beyond all memory, and uſed without any viſible interruption. *Bart.* 578. *Difference of meaſures.*

II. Cutting corn growing, or burning ſtacks of corn.

1. Every perſon who ſhall unlawfully cut or take away any corn or grain growing, being convicted thereof by confeſſion, or oath of one witneſs, before one juſtice, ſhall for the firſt offence pay ſuch damages as the juſtice ſhall appoint: and if the juſtice ſhall think him not able or ſufficient, or if he do not pay ſuch damages, he ſhall commit him to the conſtable where the offence is committed, or where the party is apprehended, there to be whipped; and for every other offence he ſhall in like manner be whipped. The conſtable refuſing, ſhall be committed by the juſtice till he conform. 43 El. c. 7. *Cutting corn growing.*

But if he cut it at one time, and then come again at another time and take it away, it is felony. 1 *Haw.* 93.

Burning corn in the night.

2. If any perſon ſhall in the night time maliciouſly and wilfully burn or cauſe to be burnt, any rick or ſtack of corn, he ſhall be guilty of felony: but to avoid judgment * of death, he may make his election to be tranſported for ſeven years. And three juſtices (1 Q.) may determine the ſame. 22 & 23 C. 2. c. 7.

*422

Burning by night or day.

3. But by the 9 G. c. 22. commonly called the Black Act, which is inſerted more at large in the title of that name, If any perſon ſhall ſet fire to any mow or ſtack of corn, he ſhall be guilty of felony without benefit of clergy. ſ. 1.

And the hundred ſhall anſwer the damages, not exceeding 200l. ſ. 7, 8, 9, 10.

And if any perſon ſhall apprehend, or cauſe to be convicted ſuch offender, and ſhall be killed, or wounded ſo as to loſe an eye, or the uſe of any limb, in apprehending or endeavouring to apprehend ſuch offender, on proof thereof at the ſeſſions, and certificate thereof from thence, the ſheriff ſhall pay to the perſon intitled the ſum of 50l in 30 days, to be repaid to him out of the treaſury. ſ. 12.

III. Aſcertaining the prices of corn.

Officers appointed to make returns.

1. By the 10 G. 3. c. 39. (which is in force for ſeven years, &c. and by the 17 G. 3. c. 44. for ſeven years further) the juſtices, at *Michaelmas* ſeſſions yearly, ſhall order returns to be made weekly of the prices of wheat, rye, barley, oats, and beans, (and in *Scotland* alſo of beer or big), from ſuch market towns as they ſhall think proper, not leſs than two nor more than ſix within any county, riding, or diviſion; and ſhall appoint a proper perſon, being an inhabitant of ſuch market town, to make ſuch returns from every ſuch market town, to the perſons appointed to receive the ſame (as hereafter mentioned). And if ſuch perſon appointed ſhall die, neglect his duty, or become incapable of performing it; two juſtices may appoint another till the next ſeſſions, and the juſtices there may confirm their choice, or appoint another till the next *Michaelmas* ſeſſions. And if the juſtices ſhall neglect to appoint proper perſons to make returns, the commiſſioners of the treaſury ſhall appoint them until the *Michaelmas* ſeſſions next following. ſ. 1, 3.

In *London*, the meal weighers ſhall take an account of the prices of wheat, rye, barley, oats, and beans, at the markets within the ſaid city, and return the average prices weekly to the perſon to be appointed as aforeſaid to receive the ſame. ſ. 2.

2. And

*2. And the juſtices ſhall cauſe a ſtandard *Wincheſter* buſhel of eight gallons to be provided and kept at each market town from whence the return ſhall be made. ſ. 4. *Meaſures to be provided for that purpoſe.* *423

3. And ſuch returns ſhall be the average prices of wheat, rye, barley, oats, and beans, by the cuſtomary meaſure of each reſpective market, and the average prices by the ſaid ſtandard or *Wincheſter* buſhel. *id.* *Returns how to be made.*

4. And every perſon making ſuch returns (except from *London*) ſhall be paid ſuch ſums as the ſaid juſtices ſhall direct, not exceeding 2s for each return, to be paid quarterly by the treaſurer out of the publick ſtock, on receiving a certificate from the perſon appointed to receive the returns, that the ſaid returns have been made according to the directions of this act, and upon receipt of duplicates of ſuch returns; which duplicates, the perſons making the ſame ſhall tranſmit to the clerk of the peace or his deputy, four times in every year, to be laid before the juſtices at their next general or quarter ſeſſions. ſ. 5. *Salary of perſons making the returns.*

5. The commiſſioners of the treaſury ſhall appoint a fit perſon to receive the returns of the treaſury; which perſon ſhall enter the returns in a book to be kept for that purpoſe, and ſhall once in every week cauſe the ſame or an abſtract thereof to be publiſhed in the *London* gazette; and ſhall alſo four times in every year tranſmit a certificate to the clerk of the peace for each county or diviſion, and to the court of the mayor and aldermen of *London*, of the returns which have been made by the ſeveral perſons appointed to make the ſame within ſuch county or diviſion, and alſo whether the ſame were regularly made. ſ. 6. *Perſon appointed to receive the returns, and his duty thereupon.*

And he ſhall receive and ſend all his letters and packets free from the duty of poſtage. ſ. 7.

IV. Importation of corn.

1. When corn doth not exceed the following prices, the cuſtom and poundage for corn imported ſhall be as follows: wheat not above 53s 4d a quarter, ſhall pay 16s; if above 53s 4d, and not above 4l, it ſhall pay 8s; rye, not above 40s a quarter, ſhall pay 16s; barley and malt, not above 32s a quarter, ſhall pay 16s; buck wheat, not above 32s a quarter, ſhall pay 16s; oats not above 16s a quarter, ſhall pay 5s 4d; peaſe or beans, not above 40s a quarter, ſhall pay 16s. 22 C. 2. c. 13. ſ. 1. *Duty on importation.*

But when the prices exceed theſe rates, then the duties payable before this act, ſhall only be paid. *id.* ſ. 2. That is to ſay, for
*424 every quarter of wheat imported 5s 4d, of * rye 4s, barley or malt 2s 8d, buck wheat 2s, oats 1s 4d, peaſe or beans 4s. 15 C. 2. c. 7. ſ. 3.

Price of corn how to be aſcertained for that purpoſe.

2. And that it may be known what price corn bears where ſuch foreign corn is imported, the juſtices of the peace for the counties where foreign corn is imported, ſhall at every their quarter ſeſſions give in charge to the grand jury to make inquiry and preſentment upon their oaths of the common market prices of the ſeveral ſorts of middling *Engliſh* corn, as the ſame ſhall be commonly bought and ſold in the county; which preſentment ſhall be certified by the juſtices to the chief officer and collector of the cuſtoms at the port where the corn is imported, to be hung up in ſome publick place in the cuſtom houſe: And the ſame ſhall be done in the city of *London* in *October* and *April* (and in *January* and *July*, 6 G. 3. c. 17.) yearly by the mayor, aldermen, and juſtices there, by the oaths of two perſons, neither of whom ſhall be corn chandler, meal man, factor, merchant, or other perſon, intereſted in ſuch corn to be imported, but by ſubſtantial houſholders in *Middleſex* or *Surry*, and each of them having a freehold eſtate of 20l a year, or leaſehold of 50l a year, above reprizes, and being ſkilful in the prices of corn. 5 G. 2. c. 12. 1 J. 2. c. 19.

But during the continuance of the 10 G. 3. c. 39. aforeſaid, the prices ſhall be aſcertained by perſons ſpecially appointed to make returns from the ſeveral counties as is above expreſſed; and the commiſſioners of the treaſury ſhall order an account of the quantities of all corn and grain exported and imported from and into *Great Britain*, together with an account of all bounties and duties paid and received thereon, to be tranſmitted annually by the commiſſioners of the cuſtoms in *England* and *Scotland*, and be regiſtred in proper books to be kept for that purpoſe, by the perſon appointed to receive the returns from the ſeveral counties as by the ſaid act is directed. 10 G. 3. c. 39. ſ. 8. And by the act of 21 G. 3. c. 50. So much of the former acts as concerns the aſcertaining of the prices, either for exportation or importation, is repealed with reſpect to the city of *London* and the counties of *Kent* and *Eſſex*, and many new regulations eſtabliſhed; which act being of conſiderable length and minuteneſs, and affecting only a ſmall part of the kingdom in compariſon, it is judged neceſſary for the particulars to refer to the act itſelf.

The ſaid duties on importation in what
*425 *caſes to ceaſe.*

3. Whenever the price of middling *Britiſh* wheat, at the ports and places where wheat ſhall be imported, ſhall be at or above 48s a quarter; rye, peaſe, or beans, 32s; barley, * beer, or bigg, 24s; oats, 16s; all cuſtoms and duties payable on importation thereof

thereof ſhall ceaſe; and in lieu thereof, ſhall be paid on importation a duty of only 6d a quarter for wheat; 2d an hundred weight for wheat flour; 3d a quarter for rye, peaſe, and beans; and 2d a quarter for barley, beer, bigg, and oats. And the ſame may be carried coaſtwiſe, under the ſame regulations as corn, flour, or grain of the growth of this kingdom. 13 G. 3. c. 43. ſ. 1.

Corn liable to the former duties on importation to be warehouſed.

4. In caſe any wheat, or wheat flour, rye, peaſe, beans, barley, beer, bigg, or oats ſhall be imported into any of the ports of *Briſtol*, *Berwick*, *Beaumaris*, *Dover*, *Exeter*, *Falmouth*, *Harwich*, *Hull*, *London*, *Lynn Regis*, *Lancaſter*, *Liverpoole*, *Milford*, *Newcaſtle*, *Newhaven*, *Poole*, *Southampton*, *Stockton*, *Whitehaven*, *Yarmouth*, *Ayr*, *Leith*, *Port Glaſgow*, *Aberdeen*, *Kirkwall*, (*Preſton*, 16 G. 3. c 39. *Portſmouth*, *Sandwich*, *Chicheſter*, *Cheſter*, 18 G. 3. c. 25. and *Cowes*, 19 G. 3. c. 29) at any time when the duties not repealed by this act ſhall be payable for ſuch ſpecies of corn, grain, or flour; the ſame upon due entry thereof, may be forthwith landed, in preſence of an officer, without payment of the duties; provided that an account be taken of the quantity, and entred in a book to be kept by the proper officer; and that the ſame be ſecured under the joint locks of the king and the importer in a warehouſe to be provided at the expence of the importer or proprietor, with the approbation of the commiſſioners of the cuſtoms or three of them, or the collector and comptroller of the cuſtoms where the ſame ſhall be imported, with liberty for the proprietor to ſcreen, turn, and take ſuch other care of the ſame as neceſſity ſhall require, in the preſence of an officer. And ſuch corn, grain, or flour, ſhall not be delivered out but on the following conditions, *viz.* If the ſame ſhall be for home conſumption, the perſon taking out the ſame ſhall pay ſuch duties as ſhall at the time of taking out be payable for the like ſort imported; and the ſame ſhall be meaſured out, and ſhall pay the duties, by the ſtricken buſhel, and not by the heaped buſhel. And if the ſame ſhall be delivered out for exportation, the owner or exporter, with one ſurety, ſhall enter into bond that the ſame ſhall not be relanded in *Great Britain*, *Ireland*, *Guernſey*, *Jerſey*, *Alderney*, *Sark*, and *Man*, or the iſlands of *Faro*.—Provided, that this ſhall not extend to prohibit corn, grain, or flour, imported from *Ireland* and warehouſed here, to be carried back to *Ireland*, ſubject to the like ſureties and reſtrictions as upon exportation of any other foreign corn, grain, or flour. 13 G. 3. c. 43. ſ. 2, 3.

* And all ſuch corn, grain, or flour ſo delivered as aforeſaid for exportation, ſhall be exported directly from the port where the ſame was ſo delivered, and not removed or carried to any other port or place in this kingdom; on pain (beſides the forfeiture of the bond) that all ſuch corn, grain, or flour, ſhall be forfeited, together with the boats, veſſels, horſes, carts, or carriages, and alſo the ſhip from whence the ſame was unloaded; and may be ſeized by any

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officer of the cuſtoms: And all perſons aſſiſting therein ſhall forfeit treble value of ſuch corn, grain, or flour: The ſaid penalties and forfeitures to be recovered and applied, as in caſe of uncuſtomed goods. ſ. 4.

And in all caſes, where any corn, grain, or flour, for which the duties have been paid, ſhall be again exported within ſix calendar months from the importation thereof; the duty ſhall be *drawn back* and repaid to the perſon exporting the ſame to any place where a drawback is allowed on the exportation of any foreign goods. ſ. 13.

V. Exportation of corn.

Exportation in what caſes prohibited.

1. Whenever the price of middling *Britiſh* wheat, at any port or place from whence the ſame ſhall be intended to be exported, ſhall be at or above 44s a quarter; no perſon ſhall export, or cauſe to be laid on board for exportation, any wheat, wheat meal or flour, malt, bread, biſcuit, or ſtarch, made of wheat: When the price of rye, peaſe, or beans, ſhall be at or above 28s a quarter; no perſon ſhall export, or cauſe to be laid on board for exportation, any rye, peaſe, or beans, ground or unground, or any bread or biſcuit made of rye, peaſe, or beans: When the price of barley, beer, or bigg, ſhall be at or above 22s a quarter; no perſon ſhall export, or cauſe to be laid on board for exportation, any barley, beer, or bigg, or malt, bread, or biſcuit, made of barley, beer, or bigg: And when the price of oats ſhall be at or above 14s a quarter; no perſon ſhall export, or cauſe to be laid on board for exportation, any oats or oatmeal, or malt, bread, or biſcuit, made of oats: The ſaid prices to be aſcertained in manner aforeſaid (ſave that the prices of corn and grain, and of oatmeal exported, ſhall be governed by the average prices at which the ſame ſhall be ſold in the publick market at or neareſt to the port of exportation on the laſt market day preceding, 14 G. 3. c. 64.) And if any perſon
*427 ſhall offend in the premiſſes, * the ſaid commodities ſo exported or ſhipped for exportation ſhall be forfeited, and every offender therein ſhall forfeit 20s for every buſhel of wheat, wheat meal or flour, rye, peaſe, beans, barley, beer, or bigg, oats, oatmeal, and malt made of any of the grains aforeſaid, ground or unground; and alſo the ſhip or veſſel and furniture ſhall be forfeited, and may be ſeized by any officer of the cuſtoms; half to the king, and half to him that ſhall ſue in the courts at *Weſtminſter* or at the aſſizes: And where the value of the penalties or forfeitures ſhall not exceed 50l, the ſame may be recovered by information before the juſtices in ſeſſions. And the maſter or mariners knowingly aſſiſting therein, ſhall on conviction

in

in any ſuch courts reſpectively, be impriſoned three months. 13 G. 3. c. 43. ſ. 5.

Provided, that this ſhall not extend to prohibit the exportation or carrying out of ſo much of any of the ſaid articles as ſhall be neceſſary for any ſhips in their voyage, or for his majeſty's ſhips of war, forces, forts, or garriſons. ſ. 6.

Nor to prohibit carrying the ſame coaſtwiſe, with the uſual coquets. ſ. 7.

Provided alſo, that nothing herein ſhall extend to prohibit the exporting yearly from the port of *London* to *Gibraltar*, any quantity of wheat, meal, flour, rye, barley, or malt, not exceeding 2500 quarters in the whole; to *Minorca*, 3500; to *St. Helena*, (or any of the ſettlements of the *Eaſt India* company, 1000, 16 G. 3. c. 37. From the port of *Southampton* to *Guernſey*, *Jerſey* and *Alderney*, any quantity of wheat, meal, flour, rye, barley, malt, bread, biſcuit, or peaſe, not exceeding 500 quarters in the whole, 14 G. 3. c. 5. ſ. 4.): From the ports of *Whitehaven* and *Liverpoole* to the Iſle of *Man*, any quantity of wheat, barley, oats, meal, or flour, not exceeding 2500 quarters in the whole, half thereof from *Whitehaven*, and half from *Liverpoole*. ſ. 8.

Provided alſo, that this ſhall not extend to prohibit the exportation of beans to the *Britiſh* forts or factories in *Africa*, or for the uſe of the ſhips trading on that coaſt which have been uſually ſupplied from *Great Britain*; or to prohibit the *African* company from exporting annually any quantity of wheat flour not exceeding 200 quarters, or any quantity of bread or biſcuit, or of bread and biſcuit together, not exceeding 15 tons, to the ſaid forts or factories. ſ. 9.

Nor to prohibit corn, grain, or flour, from being exported to *Ireland*, during ſuch time as any general * prohibition or embargo *428 on the exportation of corn, grain, or flour, ſhall be in force in that kingdom. ſ. 10.

Nor to proihbit the exporting yearly, from the port of *London* only, any wheat, meal, flour, bread, and ſtarch, made of wheat, not exceeding 2000 quarters in the whole; nor, from the port of *London*, or any other port, any other ſort of corn and grain, peaſe and beans, ground or unground, malt and oatmeal,—to any of his majeſty's ſugar colonies in *America*. 14 G. 3. c. 5. ſ. 1. (And for the purpoſes of carrying this act into execution, four hundred weight avoirdupois of meal, and three hundred weight avoirdupois of flour, bread, biſcuit, and ſtarch, made of wheat, ſhall be deemed equal to one quarter of wheat. ſ. 6.)

Provided alſo, that it ſhall be lawful to export yearly from the port of *Briſtol* biſcuit and peaſe, not exceeding in the whole 150 tons of biſcuit and 300 quarters of peaſe, from the port of *Poole* not exceeding 250 tons of biſcuit and 700 quarters of peaſe, from the port of *Dartmouth* not exceeding 150 tons of biſcuit and 300 quarters of peaſe, from the ports of *Topſham* and *Tingmouth* within the

the port of *Exeter* not exceeding 150 tons of biſcuit and 300 quarters of peaſe, to the iſland of *Newfoundland*, for the benefit of the fiſhery there. 14 G. 3. c. 11.

And provided, that it ſhall be lawful to export yearly, from the port of *London* only, wheat meal or flour not exceeding in the whole 200 quarters, and oats, oatmeal, grotts, barley, peaſe, beans, malt, and biſcuit, not exceeding together in the whole 250 quarters, to *Hudſon's Bay*, for the benefit of the company there. 14 G. 3. c. 26.

And by the 18 G. 3. c. 16. for the uſe of the *Britiſh* fiſheries at the iſland of *Newfoundland*, *Nova Scotia*, *Bay Chaleur*, and *Labrador*, further quantities of wheat, flour, biſcuit and peaſe, are permitted to be exported from the ports of *London*, *Briſtol*, *Poole*, *Dartmouth*, *Totſham*, *Tingmouth*, *Barnſtaple*, *Liverpoole*, *Weymouth*, and *Cheſter*.

Bounty on exportation.

2. By the aforeſaid act of the 13 G. 3. c. 43. the former bounties on exportation ſhall ceaſe; and inſtead thereof there ſhall be allowed on the exportation of corn or grain, either ground or unground, being the growth of this kingdom, and put on board in *Britiſh* ſhipping, the maſter and at leaſt two thirds of the mariners being his majeſty's ſubjects, the ſeveral bounties following: That is to ſay, when the price of middling *Britiſh* wheat ſhall be under 44s a quarter (to be aſcertained as aforeſaid), there ſhall be allowed a
*429 bounty of 5s for every quarter * of wheat, and 5s for every quarter of malt made of wheat: When rye ſhall be under 28s a quarter, there ſhall be allowed a bounty of 3s for every quarter of rye: When barley, beer, or bigg, ſhall be under 22s a quarter, there ſhall be allowed a bounty of 2s 6d for every quarter of barley, beer, or bigg, and 2s 6d for every quarter of malt made of barley, beer, or bigg: And when oats ſhall be under 14s a quarter, there ſhall be allowed a bounty of 2s for every quarter of oats, and 2s 6d for every quarter of oatmeal, computed at the rate of 276lb avoirdupois to a quarter. ſ. 11.

Provided, that if any perſon ſhall have entred outwards any of the ſaid articles, and begun to ſhip or lay the ſame on board, during the time that the prices of middling *Britiſh* corn, ſhall be under the rates aforeſaid; he ſhall not be prohibited from exporting the ſame, or ſo much thereof as ſhall be ſo ſhipped, within 20 days from the entry thereof at the cuſtom houſe, nor from receiving the bounty, altho' the prices may have ariſen above the rates herein before ſpecified, after the ſaid ſhipping, and before the exportation. ſ. 12.

Penalty of hindring exportation.

3. If any perſon ſhall willfully and maliciouſly beat, wound, or uſe any other violence to any perſon, with an intent to hinder him from buying corn in any market or other place; or ſhall unlawfully ſtop or ſeize upon any waggon, cart, or other carriage, or horſe, loaden with wheat, flour, meal, malt, or

other

other grain, in or on the way to or from any city, market town, or ſea port, and wilfully and maliciouſly break, cut, ſeparate, or deſtroy the ſame or any part thereof, or the harneſs of the horſes drawing the ſame; or ſhall unlawfully take off, drive away, kill, or wound any ſuch horſes; or unlawfully beat or wound the driver; or ſhall by cutting of the ſacks or otherwiſe, ſcatter or throw abroad ſuch wheat, flour, meal, malt, or other grain, or ſhall take and carry away, ſpoil, or damage the ſame, or any part thereof: he ſhall, on conviction before two juſtices of the ſeſſions, be ſent to the gaol or houſe of correction, for any time not exceeding three months, nor leſs than one month, and be once publickly and openly whipped by the maſter of ſuch gaol or houſe of correction, in ſuch city, market town, or ſea port in or near which the offence ſhall be committed, on the firſt convenient market day, at the market croſs or market place there, between the hours of eleven and two. 11 G. 2. c 22. ſ. 1.

And if any ſuch perſon, ſo convicted, ſhall commit any of the offences aforeſaid a ſecond time, or if any perſon * ſhall wilfully or maliciouſly pull down, throw down, or otherwiſe deſtroy any ſtorehouſe, or granary, or other place where corn ſhall be then kept in order to be exported; or ſhall unlawfully enter any ſuch ſtorehouſe, granary, or other place, and take and carry away any corn, flour, meal, or grain therefrom, or ſhall throw abroad or ſpoil the ſame or any part thereof; or ſhall unlawfully enter on board any ſhip or veſſel, and ſhall wilfully and maliciouſly take and carry away, caſt out therefrom, or otherwiſe ſpoil or damage any meal, flour, wheat, or grain therein, intended for exportation; he ſhall be guilty of felony, and tranſported for ſeven years. ſ. 2, 3. *430

And the hundred ſhall anſwer damages (not exceeding 100l) as in caſes of robbery; the perſon injured giving notice of the offence in two days, by himſelf or ſervant, to a conſtable of the hundred, or the conſtable of the place in or near which the fact ſhall be committed; and within ten days after ſuch notice, giving in the examination on oath of himſelf or of his ſervant preſent at the time of the fact, or having the care of ſuch his property, before a juſtice of the peace, whether he knows the perſons that committed the fact, or any of them; and if he does, then entring into recognizance to proſecute. ſ. 5, 6.

But if an offender is convicted in 12 months the hundred ſhall not be liable; and therefore the action muſt not be brought till after one year; nor ſhall it be commenced but within 2 years. ſ. 7, 8.

CORONER.

CORONERS are ancient officers by the common law, ſo called becauſe they deal principally with the pleas of the crown, and were of old time the principal conſervators of the peace. 2 *Haw.* 42.

Concerning whom I ſhall ſhew,

I. Who may be a coroner.
II. How choſen.
III. His power and duty in taking an inquiſition of death.
* 431 * *IV. His power and duty in other matters.*
V. His fees.
VI. Puniſhment for not doing his duty.

I. Who may be a coroner.

Dignity. 1. Of ancient time this office was of great eſtimation; for none could have it under the degree of a knight. 3 Ed. 1. c. 10. 4 Inſt. 271.

Eſtate. 2. And by the 14 Ed. 3. ſt. 1. c. 8. No coroner ſhall be choſen unleſs he have land in fee, ſufficient in the ſame county, whereof he may anſwer to all manner of people.

II. How choſen.

To be choſen in the county court. 1. The coroner (as of ancient time the ſheriffs and conſervators of the peace) ſhall be choſen in full county, that is, in the county court, by the commons of the ſame county. 28 Ed. 3. c. 6.

And this muſt be in purſuance of the king's writ for that purpoſe, iſſuing out of, and returnable into the chancery; and none but freeholders have a voice at ſuch election, for they only are ſuitors to the county court. 2 *Haw.* 43, 44.

County to anſwer for him. 2. And being elected by the county, if he be inſufficient, and not able to anſwer ſuch fines and other duties in reſpect of his office, as he ought; the county, as his ſuperior, ſhall anſwer for him. 2 Inſt. 175.

3. And

3. And being choſen by the county, his office continues, notwithſtanding the demiſe of the king. 4 Inſt. 271. *Office not void by the king's death.*

4. And after he is choſen, he ſhall be ſworn by the ſheriff, for the due execution of his office. 2 *Hale's* H. 55. *To be ſworn.*

5. But in the ſtatute of 28 Ed. 3. which enacts that they ſhall be choſen by the county, there is a ſaving to the king and other lords, who ought to make coroners, their franchiſes. *Others not choſen by the county.*

6. The lord chief juſtice of the king's bench, by virtue of his office, is the chief coroner of *England*. 2 H. H. 53. *Chief juſtice.*

* III. *His power and duty in taking an inquiſition of death.* *432

1. When it happens that any perſon comes to an unnatural death, the townſhip ſhall give notice thereof to the coroner. Otherwiſe if the body be interred before he come, the townſhip ſhall be amerced *Hale's Pl.* 170. *Notice.*

2. And by *Holt* Ch. J. It is a matter indictable to bury a man that dies a violent death, before the coroner's inqueſt have ſat upon him. 2 *Haw. Not.* 8. *Burying without notice.*

3. And if the townſhip ſhall ſuffer the body to lie till putrefaction, without ſending for him, they ſhall be amerced. *Hale's Pl.* 270. 2 *Haw.* 48. *Lying unburied.*

4. When notice is given to the coroner, he is to iſſue a precept to the conſtables of the four, five, or ſix next townſhips, to return a competent number of good and lawful men of their townſhips, to appear before him in ſuch a place, to make an inquiſition touching that matter. 4 Ed. 1. ſt. 2. 2 H. H. 59. Or he may ſend his precept to the conſtable of the hundred. *Wood*, b. 4. c. 1. *Precept to ſummon a jury.*

But the aforeſaid ſtatute being wholly directory, and in affirmance of the common law, doth neither reſtrain the coroner from any branch of his power, nor excuſe him from the execution of any part of his duty not mentioned in it, which was incident to his office before: Upon which ground it hath been holden, that there is no neceſſity that it appear in a coroner's inqueſt, that it was taken by the oaths of perſons of the next adjacent towns; but that it is ſufficient to ſay, that it was taken by the oaths of lawful perſons of the county; inaſmuch as ſuch inquiſitions, being good before the ſtatute, which is wholly declaratory, muſt needs be ſo ſtill. But it

ſeems that it ought to appear in every ſuch inquiſition, at what place, and by what jurors by name it was taken, and that ſuch jurors were ſworn. 2 *Haw.* 47.

Jury.

5. Theſe are to be at leaſt 12; and it is ſaid, that all perſons of the neighbouring towns, above the age of twelve years, are bound to attend at the taking the inquiſition, unleſs they have a reaſonable excuſe to the contrary. 2 Inſt. 148. 2 *Haw.* 54.

Default in not appearing.

6. If the conſtables make not a return, or the jurors returned appear not, their defaults are to be returned to the coroner: and the conſtables or jurors in default ſhall be amerced before the judges of aſſize. 2 H. H. 59.

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Swearing and charge.

*7. The jury appearing is to be ſworn and charged by the coroner to enquire, upon the view of the body, how the party came by his death. 2. H. H. 60.

View of the body.

8. For he can take inquiſition of death, only upon view of the body, and not otherwiſe, therefore if the body be interred before he come, he muſt dig it up. And this he may do lawfully within any convenient time, as in 14 days. *Hale's Pl.* 170. 2 *Haw.* 48.

Where the body cannot be viewed.

9. If the body cannot be viewed, the coroner can do nothing; but the juſtices of the peace ſhall enquire thereof. *Hale's Pl.* 170. 2 *Haw.* 48.

Form of the charge where a perſon is ſlain.

10. The jury being ſworn, and the body upon view, he ſhall enquire upon the oaths of them, in this manner, by the ſtatute of 4 Ed. 1. ſt. 2. called the ſtatute *de officio coronatoris*; *viz.*

If they know where the perſon was ſlain; whether it were in any houſe, field, bed, tavern, or company:

Who are culpable either of the act, or of the force; and who were preſent, either men or women, and of what age ſoever they be, if they can ſpeak, or have any diſcretion:

And how many ſoever be found culpable, they ſhall be taken and delivered to the ſheriff, and ſhall be committed to the gaol:

And ſuch as be found, and be not culpable, ſhall be attached until the coming of the judges of aſſize.

Where a perſon ſlain is found in the fields or woods.

11. And, by the ſame ſtatute, if it fortune any ſuch man ſlain, which is found in the fields, or in the woods, firſt it is to be enquired, whether he were ſlain in the ſame place or not:

And if he were brought and laid there, they ſhould do ſo much as they can to follow their ſteps that brought the body thither, whether he were brought upon a horſe, or in a cart.

It ſhall alſo be enquired, if the dead perſon were known, or elſe a ſtranger, and where he lay the night before.

12. Alſo, by the ſame ſtatute, all wounds ought to be viewed, the length, breadth, and deepneſs; and with what weapons; and in what part of the body the wound or hurt is; and how many be culpable; and how many wounds there be; and who gave the wound. *Wounds.*

13. And they muſt hear evidence on all hands, if it be offered to them, and that upon oath, becauſe it is not ſo much an accuſation or an indictment, as an inquiſition or inqueſt of office. 2 H. H. 157. *Defendant's evidence.*

14. And by the aforeſaid ſtatute, if any be found culpable of the murder, the coroner ſhall immediately go to his houſe, and ſhall enquire what goods he hath, and what corn he hath in his graunge; and if he be a freeman, they ſhall * enquire how much land he hath, and what it is worth yearly, and further, what corn he hath upon the ground; and likewiſe of his freehold, how much it is worth yearly, over and above the ſervice due to the lord of the fee; and the lands ſhall remain in the king's hands, until the lords of the fee have made fine for it: *To enquire of the murderer's lands and goods.* *434

And when they have thus enquired upon every thing, they ſhall cauſe all the land, corn, and goods to be valued, in like manner as if they ſhould be ſold immediately; and thereupon they ſhall be delivered to the whole townſhip, which ſhall be anſwerable before the judges for all.

15. In like manner, by the ſaid ſtatute, it is to be enquired of them that be drowned, or ſuddenly dead, whether they were ſo drowned, or ſlain, or ſtrangled by the ſign of a cord tied ſtreight about their necks, or about any of their members, or upon any other hurt found upon their bodies. And if they were not ſlain, then ought the coroner to attach the finders, and all other in the company. *Perſons drowned or ſuddenly dead.*

16. He ſhall alſo enquire, whether the perſons found guilty, fled; for which flight they forfeit goods and chattels. 2 Haw. 48, 53. *Flight.*

And it hath been formerly held, that if a perſon were ſlain, and upon the coroner's inqueſt on view of the body, it were found that ſuch a perſon fled, tho' the ſaid perſon were afterwards acquitted both of the felony and flight, yet he forfeited his goods; for the coroner's inqueſt is ſo ſolemn, that it is not traverſable; alſo when the goods are once lawfully veſted in the king, by that inqueſt, the property of them cannot be diveſted. But this opinion ſeemeth harſh and unreaſonable, that a man ſhall be liable to forfeit all his goods, which may perhaps be all that he is worth, by an inqueſt taken in his abſence, without either hearing him, or giving him an opportunity of defending himſelf. 1 *Bac. Abr.* Coron. D. 2 *Haw.* 54.

Alſo it is ſtrongly holden in ſome books, that an inqueſt of ſelf murder, found before a coroner, cannot be traverſed: but the contrary opinion being alſo holden by books of as great authority, and ſeeming alſo to be more agreeable to the general tenor of the law in other caſes, it ſeems to be the better opinion, that ſuch inqueſt, by being removed into the king's bench by certiorari, may be there traverſed by the executor or adminiſtrator of the perſon deceaſed; or, in caſe the coroner's inqueſt find him to have been a lunatick, by the king or the lord of the manor. 1 *Bac. Abr.* Coron. D. 2 *Haw.* 54.

Townſhip amerced for an eſcape.

17. And if any perſon be ſlain or murdered in the day time, and the murderer eſcape untaken, the townſhip ſhall be amerced. 3 H. 7. c. 1.

*435 *Deodands.*

* 18. Concerning horſes, boats, carts, and the like, whereby any are ſlain, which properly are called deodands, they alſo ſhall be valued, and delivered unto the towns as before. 4 Ed. 1. ſt. 2.

Coroner's rolls.

19. All which things muſt be enrolled in the rolls of the coroner. 4 Ed. 1. ſt. 2.

Sheriff's rolls.

20. And the ſheriffs ſhall have counter rolls with the coroner, of things belonging to their office. 3 Ed. 1. c. 10.

Adjourning after view.

21. But it is not neceſſary that the inquiſition be taken in the very ſame place where the body was viewed; but they may adjourn to a place more convenient. 2 *Haw.* 48.

Burial.

22. Immediately upon theſe things being enquired, the bodies of ſuch perſons being dead, or ſlain, ſhall be buried. 4 Ed. 1. ſt. 2.

Certifying to the aſſizes.

23. By the 1 & 2 P. & M. c. 13. ſ. 5. Every coroner, upon any inquiſition before him found, whereby any perſon ſhall be indicted for murder or manſlaughter or as acceſſary before the offence committed, ſhall put in writing the effect of the evidence given to the jury before him, being material; and ſhall bind over the witneſſes to the next general gaol delivery to give evidence; and ſhall certify the evidence, the recognizance, and the inquiſition or indictment before him taken and found, at or before the trial, on pain of being fined by the court.

By the expreſs words of which ſtatute, he may enquire of *acceſſaries before the fact*; but he cannot enquire of acceſſaries *after* the fact. 2 *Haw.* 48.

Perſons dying in gaol.

24. He ought alſo to enquire of the death of all perſons who die in priſon; that it may be known, whether they died by violence, or any unreaſonable hardſhips: for if a priſoner, by the dureſs of the

the gaoler, comes to an untimely death, it is murder in the gaoler, and the law implies malice in reſpect of the cruelty. 3 Inſt. 52, 91.

And this inqueſt upon priſoners ought to conſiſt of a party jury, that is, ſix of the priſoners (if ſo many there be), and ſix of the next vill or pariſh, not priſoners. *Umfreville's Coron.* 212.

25. If the inquiſition ſhall be quaſhed in the court of king's bench, the coroner by leave of the court may take up the body again, and take a new inquiſition. E. 5 G. *K.* and *Saunders. Str.* 167. M. 9 G. Caſe of the coroner of *Wenlock. Str.* 533. *Inquiſition quaſhed.*

And if a coroner appear to have been corrupt in taking an inqueſt, it ſeems that a *melius inquirendum* ſhall go to ſpecial commiſſioners, who ſhall proceed not on view, but upon teſtimony; and the coroner ſhall have nothing to do with ſuch inqueſt: but where the inqueſt is quaſhed for want of form only, he ſhall take a new one in like manner, as if he had taken none before. 1 *B. Abr.* Coron. D.

* *IV. His power and duty in other matters.* *436

1. He ought to inquire of treaſure that is found; who were the finders, and likewiſe who is ſuſpected thereof; and that may well be perceived, where one liveth riotouſly, haunting taverns, and hath done ſo of long time: hereupon he may be attached for this ſuſpicion, by four, or ſix, or more pledges, if he may be found. 4 Ed. 1. ſt. 2. *Treaſure trove.*

2. Beſides his judicial place, he hath alſo an authority miniſterial as a ſheriff; namely, when there is juſt exception taken to the ſheriff, judicial proceſs ſhall be awarded to the coroner, for the execution of the king's writs: and in ſome ſpecial caſes, the king's original writ ſhall be immediately directed to him. 4 Inſt. 271. *Executing proceſs.*

3. He is bound to be preſent in the county court, to pronounce judgment of outlawry upon the exigent, after *quinto exactus*, at the fifth court, if the defendant doth not appear. *Wood*, b. 4. c. 1. *Outlawry.*

4. He had anciently alſo a power in certain appeals, as of rape, and maim; and alſo in caſes of abjuration for felony or other offences; which are now out of uſe. *Appeals, abjuration.*

V. His fees.

Fee of 13s 4d. 1. By the ſtatute of 3 H. 7. c. 1. The coroner ſhall have for his fee, upon every inquiſition taken upon the view of the body ſlain, 13s 4d of the goods and chattels of him that is the ſlayer and murderer, if he have any goods; and if not, he ſhall have for his ſaid fee, of ſuch amerciaments as ſhall fortune any townſhip to be amerced for eſcape of ſuch murderer.

Fee of 20s, and alſo 9d a mile. 2. Moreover, by the 25 G. 2. c. 29. For every inquiſition (not taken upon view of a body dying in gaol) he ſhall have 20s, and alſo 9d for every mile he ſhall be compelled to travel from his uſual place of abode to take ſuch inquiſition; to be paid by order of the juſtices in ſeſſions, out of the county rates; for which order no fee ſhall be paid. ſ. 1.

And for every inquiſition taken on view of a body dying in priſon, he ſhall be paid ſo much, not exceeding 20s, as the juſtices in ſeſſions ſhall allow: to be paid in like manner. ſ. 2.

*437 But no coroner of the king's houſhold, and of the verge of the king's palaces; nor any coroner of the admiralty; * nor of the county palatine of *Durham*; nor of the city of *London* and borough of *Southwark*; nor any franchiſes belonging to the ſaid city; nor of any city, town, or franchiſe, not contributing to the county rates, or within which ſuch rates have not been uſually aſſeſſed, ſhall be intitled to any benefit by this act; but they ſhall have ſuch fees and ſalaries as they were allowed before this act, or as ſhall be allowed by the perſons by whom they have been appointed. ſ. 5.

* VI. His puniſhment for not doing his duty.

His puniſhment for neglect of duty. 1. Coroners concealing felonies, or not doing their duty through favour to the miſdoers, ſhall be impriſoned a year, and fined at the king's pleaſure. 3 Ed. 1. c. 9.

2. And by the 3 H. 7. c. 1. If any coroner be remiſs, and make not inquiſitions upon the view of the body dead, and certify the ſame to the gaol delivery, he ſhall forfeit to the king an hundred ſhillings.

3. And by the 25 G. 2. c. 29. If any coroner, not appointed by an annual election or nomination, or whoſe office is not annexed to any other office, ſhall be convicted of extortion for taking more than his lawful fees, or of wilful neglect of his duty, or miſdemeanor

miſdemeanor in his office; the court before whom he ſhall be convicted may adjudge him to be removed from his office; and thereupon, if he ſhall have been elected by the freeholders, a writ ſhall iſſue for the amoving him, and the electing another in his ſtead; and if he hath been appointed by the lord of any liberty or franchiſe, or in any other manner than by the freeholders, the perſon intitled to nomination ſhall, on notice of ſuch judgment of amoval, nominate another perſon in his ſtead. ſ. 6.

4. And he ought to execute his office in perſon and not by deputy; for he is a judicial officer. *Wood*, b. 4. c. 1. Otherwiſe it ſeemeth that he ſhall incur the aforeſaid penalties, for remiſſneſs or neglect of duty.

The coroner's precept to ſummon a jury.

Weſtmorland. } To the conſtable of ——— in the ſaid county.

THESE *are in the name of our ſovereign lord the king, to require you, immediately upon ſight hereof, to ſummon and warn* 24 *good and lawful men of the four next townſhips to* ——— *in the ſaid county, to be and appear before me* A. C. * *gentleman, one of the coroners of the county aforeſaid, at* ——— *aforeſaid, in the ſaid county, on the* ——— *day of* ——— *then and there to enquire of, do, and execute all ſuch things as on his majeſty's behalf ſhall be lawfully given them in charge, touching the death of* A. D. *And be you then there to certify what you ſhall have done in the premiſſes, and further to do and execute what in behalf of our ſaid lord the king ſhall be then and there enjoined you. Given under my hand and ſeal the* ——— *day of* ———

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The juror's oath on the coroner's inqueſt.

YOU *ſhall diligently enquire, and true preſentment make, on the behalf of our ſovereign lord the king, how and in what manner* A. D. (or, *a perſon unknown*, as the caſe is) *here lying dead, came to his death; and of ſuch other matters relating to the ſame as ſhall be lawfully required of you, according to your evidence: So help you God.*

After the foreman is ſworn, the reſt may be ſworn, three or four together, as follows:

Such oath as A. F. *the foreman of this inqueſt hath for his part taken, you and every of you ſhall well and truly obſerve and keep on your parts reſpectively: So help you God.*

Witneſſes

Witneſſes oath.

THE *evidence which you ſhall give to this inqueſt, on the behalf of our ſove-reign lord the king, touching the death of* A. D. *ſhall be the truth, the whole truth, and nothing but the truth: So help you God.*

Inquiſition of murder.

Weſtmorland. AN *inquiſition indented, taken at* ——— *in the county of* ——— *aforeſaid, the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— *before me* A. C. *gentleman, one of the coroners of our lord the king, for the county aforeſaid, upon the view of the body of* A. D. *then and there lying dead, upon the oaths of* A. B. C. D. E. F. *&c. good and lawful men of* ——— *aforeſaid, and of three other of the next towns, to wit,* K. L. *and* M. *in the ſaid county, who being ſworn and charged to enquire on the part of our ſaid lord the king, when, where, how, and after what manner, the ſaid* A. D. *came to his death, do ſay, upon their oath, that one* A. M. *late of* ——— *aforeſaid, gentleman, not having God before*
*439 *his eyes, but being moved and * ſeduced by the inſtigation of the devil, on the* ——— *day of* ——— *in the* ——— *year of* ——— *aforeſaid, at the firſt hour in the night of the ſame day, with force and arms at* ——— *in the county aforeſaid, in and upon the aforeſaid* A. D. *then and there being in the peace of God, and of the ſaid lord the king, feloniouſly, voluntarily, and of his malice forethought, made an aſſault: And that the aforeſaid* A. M. *then and there with a certain ſword made of iron and ſteel, of the value of 5s, which he the ſaid* A. M. *then and there held in his right hand, the aforeſaid* A. D. *in and upon the left part of the belly of the ſaid* A. D. *a little above the navel of the ſaid* A. D. *then and there violently, feloniouſly, voluntarily, and of his malice forethought, ſtruck and pierced, and gave to the ſaid* A. D. *then and there with the ſword aforeſaid, in and upon the aforeſaid left part of the belly of the ſaid* A. D. *a little above the navel of the ſaid* A. D. *one mortal wound of the breadth of half an inch, and of the depth of three inches, of which ſaid mortal wound the aforeſaid* A. D. *then and there inſtantly died; and ſo the ſaid* A. M. *then and there feloniouſly killed and murdered the ſaid* A. D. *againſt the peace of our ſaid lord the king, his crown and dignity.*

And the ſaid jurors further ſay, upon their oath aforeſaid, that A. A. *of* ——— *yeoman, and* B. A. *of* ——— *yeoman, were feloniouſly preſent with drawn ſwords, at the time of the felony and murder aforeſaid, in form aforeſaid committed, that is to ſay, on the ſaid* —— *day of* ——— *in the* ——— *year aforeſaid, at* ——— *aforeſaid, in the county aforeſaid, at the firſt hour in the night of the ſame day, then and there comforting, abetting, and aiding the ſaid* A. M *to do and commit the felony and murder aforeſaid in manner aforeſaid, againſt the peace of our ſaid lord the king, his crown and dignity.*

And moreover, the jurors aforeſaid, upon their oath aforeſaid, do ſay, that the ſaid A. M. A. A. *and* B. A. *had not, nor any of them had, nor as yet have*

have or hath any goods or chattels, lands or tenements, within the county aforesaid, or elsewhere, to the knowledge of the said jurors. [Or, *and the jurors aforesaid, upon their oath aforesaid, do say, that the said* A. B. *at the time of the doing and committing of the felony and murder aforesaid, had goods and chattels, contained in the inventory to this inquisition annexed, which remain in the custody of* B. C.]

In witness whereof, as well the aforesaid coroner, as the jurors aforesaid, have to this inquisition put their seals, on the day and year, and at the place first above mentioned.

A. C. *coroner.*

A. B.
C. D.
E. F. *&c. jurors.*

* An inquisition where one hangs himself. *440

——— As above to ——— *not having God before his eyes, but being seduced and moved by the instigation of the devil, at* ——— *aforesaid, in a certain wood at* ——— *aforesaid, standing and being, the said* A. D. *being then and there alone, with a certain hempen cord of the value of 3d, which he then and there had and held in his hands, and one end thereof then and there put about his neck, and the other end thereof tied about a bough of a certain oak tree, himself then and there, with the cord aforesaid, voluntarily and feloniously, and of his malice forethought, hanged and suffocated, and so the jurors aforesaid, upon their oath aforesaid say, that the said* A. D. *then and there in manner and form aforesaid, as a felon of himself, feloniously, voluntarily, and of his malice forethought, himself killed, strangled, and murdered, against the peace,* &c.

An inquisition where one drowns himself.

——— *at* ——— *aforesaid, in the county aforesaid, then and there being alone, in a common river there, called* ——— *himself voluntarily and feloniously drowned: And so the jurors aforesaid, upon their oath aforesaid say, that the aforesaid* A. D. *in manner and form aforesaid, then and there himself voluntarily and feloniously as a felon of himself killed and murdered; against the peace* ———

An inquisition on one drowned by accident.

——— *that the said* A. D. *on the* ——— *day of* ——— *in the year aforesaid, at the parish and in the county aforesaid, going into the river* ——— *there to bathe himself, it so happened, that accidentally, casually, and by misfortune, he the said* A. D. *was in the water of the said river then and there suffocated and drowned; of which said suffocation and drowning he the said* A. D. *then and there instantly died. And so the jurors aforesaid do say, that the said* A. D. *in manner, and by the means aforesaid, accidentally, casually, and by misfortune, came to his death, and not otherwise. In witness,* &c.

An inquiſition where one dies a natural death.

——— *the ſaid* A. D. *on the* ——— *day of* ——— *in the year aforeſaid, at the pariſh and in the county aforeſaid, to wit, in a certain place called* ——— *was found dead; that he had no marks of*
*441 *violence appearing on his body, and died by* * *the viſitation of God, in a natural way, and not otherwiſe. In witneſs,* &c.

An inquiſition upon one who dies in gaol.

——— *who ſay upon their oath, that the aforeſaid* A. D. *on the day of the taking of this inquiſition, being a priſoner in the gaol at* —— *in the county aforeſaid, then and there died of the viſitation of God, and then and there in manner and form aforeſaid came to his death, and not otherwiſe. In witneſs,* &c.

An inquiſition on one *non compos mentis*.

——— *who ſay upon their oath, that the aforeſaid* A. D. *on the day and year aforeſaid, and at the time of his death, to wit, from the* ——— *day of* ——— *to the time of his death, and at the time of his death aforeſaid, was a lunatick, and a perſon of inſane mind; and that the ſaid* A. D. *being a lunatick and a perſon of inſane mind as aforeſaid, did on the* ——— *day of* ——— *come alone to a certain river, called* ——— *in the ſaid county, and did then and there caſt himſelf into the ſaid river, and drowned himſelf in the water of the ſaid river. And ſo the jurors aforeſaid, upon their oath aforeſaid ſay, that the aforeſaid* A. D. *from the cauſe aforeſaid, in manner and form aforeſaid, came to his death, and not otherwiſe. In witneſs,* &c.

An inquiſition on one for cutting his throat.

——— *by the inſtigation of the devil, at* ——— *aforeſaid, in the county aforeſaid, in and upon himſelf, then and there being in the peace of God and of the ſaid lord the king, feloniouſly, voluntarily, and of his malice forethought, made an aſſault: And that the aforeſaid* A. D. *then*

then and there with a certain knife, of the value of one penny, which he the ſaid A. D. *then and there held in his right hand, himſelf upon his throat then and there feloniouſly, voluntarily, and of his malice forethought did ſtrike, and gave to himſelf then and there with the knife aforeſaid, upon his throat aforeſaid, one mortal wound of the breadth of four inches, and the depth of one inch, of which ſaid mortal wound the ſaid* A. D. *at* ——— *aforeſaid in the county aforeſaid, languiſhed, and languiſhing lived from the ſaid* ——— *day of* ——— *in the* ——— *year aforeſaid, to the* ——— *day of* ——— *and that the ſaid* A. D. *on the* ——— *day of* ——— *aforeſaid, in the* ——— *year aforeſaid, at* * ——— *aforeſaid, in the county aforeſaid, of that mortal wound* * 442 *died. And ſo the jurors aforeſaid,* &c.

For killing another in his own defence.

——— *upon their oaths ſay, that* A. K. *late of* ——— *gentleman, at* ——— *aforeſaid in the ſaid county, on the* ——— *day of* ——— *in the* ——— *year of* ——— *in the peace of God and of our ſaid lord the king then being,* A. M. *late of* ——— *in the county of* ——— *at the hour of* ——— *in the afternoon of the ſame day, did come, and upon him the ſaid* A. K. *then and there of his malice forethought did make an aſſault, and him the ſaid* A. K. *did then and there endeavour to beat and kill, by continuing the aſſault aforeſaid, from the houſe of one* W. H. *in* ——— *aforeſaid to a certain place called* ——— *in the county aforeſaid, and the ſaid* A. K. *ſeeing that the ſaid* A. M. *was ſo maliciouſly diſpoſed, to a certain wall in the ſaid place, called* ——— *did flee, and from thence for fear of death could not eſcape, and ſo the ſaid* A. K. *himſelf, in preſervation of his life, againſt the ſaid* A. M. *continued to defend, and in his own defence him the ſaid* A. K. *upon the right part of the breaſt of him the ſaid* A. M. *with a certain ſword of the price of one ſhilling, which the ſaid* A. K. *then and there held in his right hand, did ſtrike, then and there giving to the ſaid* A. M. *one mortal wound, of the breadth of one inch, and of the depth of three inches, of which ſaid mortal wound the ſaid* A. M. *at* ——— *aforeſaid in the county aforeſaid languiſhed, and languiſhing lived from the ſaid* ——— *day of* ——— *to the* ——— *day of* ——— *from thence next enſuing, and the ſaid* A. M. *on the ſaid* ——— *day of* ——— *in the* ——— *year aforeſaid at* ——— *aforeſaid in the ſaid county, of that mortal wound died; and ſo the ſaid* A. K. *did then and there kill him the ſaid* A. M. *in his own defence.*

An inquiſition where the murder is unknown.

——— the ſame as before, only ſay, ——— *that a certain perſon unknown,* &c. and add ——— *And the ſaid jurors upon their*

oath aforeſaid further ſay, that the ſaid perſon unknown, after he had committed the ſaid felony and murder in manner aforeſaid, did flee away: againſt the peace, &c.

BY the 18 G. 3. c. 19. Whereas by the laws now in being, juſtices of the peace are not ſufficiently authoriſed, on complaints that come before them out of ſeſſions, to award coſts againſt either the perſon complaining, or the perſon againſt whom the complaint is made; it is therefore enacted, that where any complaint ſhall be made before any juſtice or juſtices, and a warrant or ſummons ſhall iſſue in conſequence thereof, it ſhall be lawful for ſuch juſtice, who ſhall have heard and determined the matter of the complaint, to award (A) ſuch coſts to be paid by either party, and in manner and form as to him ſhall ſeem meet, to the party injured: And if the perſon ſo ordered by the juſtice ſhall not forthwith pay, or give ſecurity for the ſame to the ſatisfaction of the juſtice; the ſame ſhall be levied by diſtreſs (B): And if goods and chattels of ſuch perſon cannot be found (C), the juſtice ſhall commit him (D) to the houſe of correction for the place where ſuch perſon ſhall reſide, to be kept to hard labour not exceeding one month, nor leſs than ten days, or until ſuch ſum, together with the expences attending the commitment, be firſt paid. ſ. 1.

Provided that upon the conviction of any perſon upon a penal ſtatute, where the penalty ſhall amount to or exceed the ſum of 5l, the ſaid coſts ſhall be deducted by the juſtice, according to his diſcretion, out of the penalty, ſo that the ſaid deduction ſhall not exceed one fifth part of the penalty; and the remainder of the penalty ſhall be paid to or divided among the perſon or perſons who would have been intitled to the whole of the penalty, if this act had not been made. ſ. 2.

And the juſtices in ſeſſions from time to time may lay down or alter ſuch rules and regulations concerning coſts or charges to be allowed to any perſon by virtue of this act, as to them ſhall ſeem juſt: which rules and regulations, having received the approbation and ſignature of one or more of the judges of aſſize, ſhall be binding, and not otherwiſe, on all perſons whatſoever. ſ. 9.

The following forms are inserted in the act itself.

A. Form of awarding costs.

County or borough of ——— to wit. } *I* A. J. *one of his majesty's justices of the peace in and for the* ——— *aforesaid, in pursuance of an act made in the eighteenth year of his majesty king* George *the third, intituled,* An act for * the payment of costs to parties, * 444
on complaints determined before justices of the peace out of sessions; for the payment of the charges of constables in certain cases; and for the more effectual payment of charges to witnesses and prosecutors of any larceny or other felony; *on the complaint of* ——— [here state the names of the parties and the offence generally, and the date] *against* ——— *for* ——— *which said complaint was heard and determined by me on the* ——— *day of* ——— *Do award the following costs to be paid by* ——— *videlicet* [here state the costs]. *Given under my hand and seal this* ——— *day of* ——— *in the year of our Lord* ———.

B. Form of warrant of distress and sale.

——— to wit. } To the constable of ——— and to all other his majesty's constables in and for ——— in ——— aforesaid.

Whereas I J. P. *esquire, one of his majesty's justices of the peace in and for the* ——— *aforesaid, in pursuance of an act made in the eighteenth year of his majesty king* George *the third, intituled,* An act for the payment of costs to parties, on complaints determined before justices of the peace out of sessions; for the payment of the charges of constables in certain cases; and for the more effectual payment of charges to witnesses and prosecutors of any larceny or other felony, *have awarded, on the* ——— *day of* ——— *now last past, on the complaint of* ——— *against* ——— *for* ——— *the following costs to be paid by* ——— *videlicet* [here state the sum]: *And whereas the said* ——— *being ordered by me the said justice to pay such sum as aforesaid, hath not paid down or given security for the same to the satisfaction of me the said justice; These are therefore to command you, and each and every of you, to levy the said sum of* ——— *by distress and sale of the goods and chattels of the said* ——— *and I do hereby order and direct*

direct the goods and chattels so to be distrained to be sold and disposed of within ——— *days, unless the said sum of* ——— *for which such distress shall be made, together with the reasonable charges of taking and keeping such distress, shall be sooner paid; and you are hereby also commanded to certify unto me what you shall have done by virtue of this my warrant. Given under my hand and seal at* ——— *the* ——— *day of* ——— *in the year of our Lord* ———.

*445 * C. Constable's return thereon, for want of distress.

——— to wit. } *I* ——— *constable of* ——— *do hereby certify to* ——— *justice of the peace of* ——— *that I have made diligent search for, but do not know, nor can find any goods and chattels of* ——— *by distress and sale whereof I may levy the sum of* ——— *pursuant to his warrant for that purpose dated the* ——— *day of* ———. *Given under my hand, this* ——— *day of* ——— *in* ———.

D. Commitment thereupon to the house of correction.

——— to wit. } To the constable of ——— and also to the keeper of the house of correction at ———.

Whereas in pursuance of an act made in the eighteenth year of his majesty king George *the third, intituled,* An act for the payment of costs to parties, on complaints determined before justices of the peace out of sessions; for the payment of the charges of Constables in certain cases; and for the more effectual payment of charges to witnesses and prosecutors of any larceny or other felony, *I* J. P. *esquire, one of his majesty's justices of the peace in and for the said* ——— *did issue my warrant of distress and sale, directed to* ——— *of* ——— *constable of the said* ——— *of* ——— *ordering the said constable to levy the sum of* ——— *of the goods and chattels of the said* ——— *in manner and form as therein is mentioned: And whereas it appears to me by the return of* ——— *constable of* ——— *dated the* ——— *day of* ——— *that he hath made diligent search, but doth not know of nor can find any goods and chattels of the said* ——— *by distress and sale whereof the said sum of* ——— *may be levied pursuant to the said warrant: These are therefore to command you the said constable of* ——— *to apprehend the said* ——— *and convey the said* ——— *to the said house of correction at* ——— *and to deliver the said* ——— *there to the said keeper of the said house of correction: And these are also to command you the said keeper of the said house of correction, to receive the said* ——— *into the said house of correction, and there to keep to hard labour for the space of* ——— *from the date hereof, or until such sum of* ——— *together with the expences attending the commitment of the said* ——— *to the said house of correction, be first paid, or until the said* ——— *be discharged by due course of law. Given under my hand and seal at* ——— *the* ——— *day of* ———.

The

The coſts and charges of proſecutors and witneſſes in caſes of felony are treated of under the title *FELONY*.

* T. 27 G. 3. *K.* and *Sharpleſs*. *Palmer* ſhewed cauſe againſt a rule which had been obtained by *Garrow* to diſcharge the defendant out of cuſtody as to an attachment for nonpayment of coſts, the term of impriſonment for his offence being expired. The circumſtances were, that the proſecutor, Mr. *Pembroke*, being a juſtice of the peace, had indicted the defendant, who was the keeper of the gaol at *St. Albans*, for ſuffering a priſoner to eſcape, who had been committed by him (the proſecutor) for felony; upon which indictment the defendant had been convicted. He contended that the proſecutor was intitled to his coſts under 5 & 6 W. & M. c. 11. ſ. 3. as being a public officer proſecuting for the benefit of the public. And he cited *R.* v. *Smith*, where Lord *Mansfield* ſaid, that it was enough if the proſecutor was proved to be a civil officer in order to entitle him to coſts. *446

Garrow, in ſupport of the rule, ſaid, that the proſecutor had not proſecuted *ex officio*, and therefore did not come within the rule. That as a magiſtrate he had done his duty when he had committed the felon, and there his juriſdiction had ceaſed. As for the offence of letting him eſcape, it was no more the duty of the proſecutor than of any other individual to indict the defendant for it. *R.* v. *Ingleton*. 1 *Wilſ.* 139.

Ashhurst, J.—— On looking into this act of parliament, it appears to me that the defendant ought not to be charged with the coſts. This is not one of thoſe inſtances mentioned in the third ſection of the act, which only extends to thoſe officers who proſecute or preſent *ex officio*, or where the proſecution is carried on by the party grieved. If a juſtice of the peace were to preſent a road, and that preſentment were afterwards turned into an indictment, there the juſtice would be entitled to coſts; or if a juſtice were to indict a conſtable or other inferior officer for diſobeying his order, in ſuch caſe alſo he would be entitled to his coſts. But this is not a proſecution carried on by the proſecutor as a magiſtrate; for any other perſon might have indicted the defendant: The offence in this caſe was ſuch as concerned the general juſtice of the realm.

Buller, J.—— From a review of all the caſes in a MS. note-book, it appears that the proſecutor is not entitled to his coſts. This book does not indeed include a caſe from *Baſingſtoke* which came before this court a few years ago; but there I underſtand that the proſecution was carried on by the clerk of the peace, whoſe duty it was to draw up all preſentments of conſtables in the form of * indictments; and it was there determined that the proſecutor was entitled to coſts. But here I cannot ſay that it was the duty of the proſecutor as a juſtice of the peace to proſecute this defendant. The caſe originally came before him in the character of a magiſtrate on the complaint of ſome other perſon; and if the juſtice choſe to take the proſecution out of private hands, and to conduct it himſelf, he *447

cannot

cannot be ſaid to proſecute as a magiſtrate, but like any other individual. The court has always conſtrued this act of parliament as ſtrictly as poſſible. There was one cauſe indeed on this ſtatute, the law of which I doubt, where it was held that a perſon who was injured, and was really the proſecutrix, was not entitled to coſts, becauſe her name did not appear on the back of the indictment, though it was well known ſhe was the real proſecutrix (*a*): but I believe that caſe has been ſince over-ruled. Another caſe afterwards came before this court, where the queſtion was, whether the proſecutor was intitled to the coſts of a trial at bar, and it was determined that he was not, becauſe the ſtatute only extended to ſmall offences (*b*). Theſe caſes ſhew that the court has always put a ſtrict conſtruction on this act of parliament.

(*a*) Rex *v.* Goter, M. 16 G. 3. *the proſecutrix was Lady* Cowper, *who indicted the defendant for a public nuiſance.*

(*b*) *This appears from* MSS. *notes of Sir* Simon Harcourt, *when he was maſter of the Crown office; and which was the ſame book that Mr. Juſtice* Buller *referred to.*

Rule abſolute.—*Durnf.* and *Eaſt.* 2 *v.* 47.

COTTAGES.

COTTAGE (Sax. *Cote*) is a little houſe for habitation, without any land belonging to it. By the 31 El. c. 7. cottages were prohibited to be erected without laying at leaſt four acres of land to the ſame, and divers other reſtrictions were thereby enjoined; but the ſame was repealed by the 15 G. 3. c. 32. ſetting forth, that the ſaid ſtatute of 31 El. had laid the induſtrious poor under great difficulties to procure habitations, and tended very much to leſſen population, and in divers other reſpects was inconvenient to the labouring part of the nation in general.

COUNTY COURT.

County.

1. ANCIENTLY, the *comites*, *counts*, or *earls*, had the government of the counties; and

and afterwards the *vicecomites* or *ſheriffs*. And the county ſeemeth to be * nothing elſe but the diſtrict of the *comes* or *count*. *Shire* is a *Saxon* word, from *Scyron*, to ſhare or divide, for that the ſhires and counties are divided by certain metes and bounds from each other. And the *ſheriff*, in Saxon *ſcyregereſa*, is the *reve*, *grave*, or governor of the *ſhire*; wherein he hath great power, being therein the chief officer under the king. * 448

County court.

2. The ſheriff holdeth in his county two courts; the *torn* and the *county court*. The *torn* is the king's court of record for criminal cauſes, and for redreſſing of common grievances within the county; the *county court* is not a court of record, but only a court baron, for civil cauſes, and this is the court of the ſheriff himſelf.

When to be holden.

3. By the 2 & 3 Ed. 6. c. 25. No county court ſhall be longer deferred than one month from court to court, ſo that the county court ſhall be kept every month, and not otherwiſe.

And this is to be accounted 28 days to the month, and not according to the month of the calendar. 2 Inſt. 71.

Where to be kept.

It may be kept at any place within the county, unleſs reſtrained by ſtatute. *Wood*, b. 4. c. 1.

How far the ſheriff is judge.

5. The ſuitors, that is, the freeholders, are the judges in this court; except that in re-diſſeiſin, by the ſtatute of *Merton*, the ſheriff is judge. And by the ſtatutes concerning parliamentary elections, he is judge at the election of knights; for he muſt make a true return at his peril. *Barl.* County Court.

Of what ſum this court hath cognizance.

6. This court ſhall hold pleas betwixt party and party, where the debt or damage is under 40s. 4 Inſt. 266.

But in a *replevin*, the ſum may be above 40s. 4 Inſt. 266.

Of what offences this court hath cognizance.

7. Alſo it hath not cognizance of treſpaſs *vi et armis*, becauſe a fine is thereby due to the king, which it cannot impoſe. 4 Inſt. 266.

One plaint for one treſpaſs or contract.

8. And by the 11 H. 7. c. 15. No plaint ſhall be entered in the county court, but where the plaintiff or his attorney is preſent; and the plaintiff ſhall find pledges to purſue his plaint; and he ſhall have but one plaint for one treſpaſs or contract; on pain of 40s, half to the king, and half to the proſecutor. And one juſtice may examine the ſheriff or other officer making default; and ſhall, within a quarter of a year, certify the examination into the exchequer.

But as to the pledges above mentioned, they are now diſuſed in this court; and were formerly uſed only in caſes where the plaintiff lived out of the county. *Green.* 11. *Rad.* County C.

*449 * 9. But by virtue of a writ of *juſticies*, the court may hold plea of treſpaſs *vi & armis*, and of any ſum, or of all actions perſonal above 40s. For this writ is in the nature of a commiſſion to the ſheriff, for the ſake of diſpatch, to do the ſame *juſtice* in his county court, as might otherwiſe be had in the courts at *Weſtminſter*. 4 Inſt. 266.

Writ of juſticies.

10. By the 12 G. 2. c. 13. ſ. 7. If any perſon ſhall commence or defend any action, or ſue out any writ, proceſs, or ſummons, or carry on any proceedings in the county court, who ſhall not be admitted attorney, or ſolicitor according to the act of 2 G. 2. c. 23. he ſhall forfeit 20l with coſts, to him who ſhall ſue in any court of record.

Who ſhall act as attorney in this court.

11. The plaintiff in this court firſt takes out a ſummons, returnable at the next county court; and if the defendant do not appear, an attachment or *diſtringas* is to be made out: but if the defendant appears, the plaintiff is to file his declaration, ſhewing his cauſe of action, or matter of complaint, in what manner the action accrued, at what time and place the wrong was done, and the damage he hath ſuſtained. *Greenw.* 11. *Read.* County C.

Summons.

12. If the defendant doth appear, and the next court after gives a rule to declare, and the plaintiff doth not file his declaration within the time, he may be nonſuited. *id.*

Declaration.

13. When the plaintiff hath declared, he muſt continue his ſuit from court day to court day, otherwiſe the defendant may take advantage of it; and this is called a continuance, being an adjourning of the ſuit from time to time, to keep it on foot. *id.*

Continuance.

14. The rule, or *dies datus*, is when farther day is given to the plaintiff to declare, or to the defendant to plead; and the time given is uſually to the next court day, but upon occaſion may be enlarged. *id.*

Dies datus.

15. The next court after filing the declaration, and imparlance given, the defendant is to put in his anſwer or plea, and if the plaintiff join iſſue, they may proceed to trial the next court day, if they proceed not farther by replication, rejoinder, ſurrejoinder, and the like. *id.*

Anſwer.

16. But if freehold is pleaded by the defendant, this court can proceed no further, for freehold ſhall never be tried without writ; therefore the cauſe muſt be removed; as when a defendant avoweth for damage feaſant, and the plaintiff juſtifieth by reaſon of common of paſture. *Wood*, b. 4. c. 1.

Plea of freehold.

17. Where a verdict is given for the plaintiff, and judgment entered thereupon, a *fieri facias* may be awarded againſt the defendant's goods, which

Judgment and diſtreſs.

which may be taken by * virtue thereof, and appraiſed and ſold, *450
to ſatisfy the plaintiff; but if the defendant hath no goods whereupon to levy, the plaintiff remains without remedy in this court, for it being no court of record, no *capias* lies there; but an action may be brought at common law upon the judgment entered. *Greenw.* 22. *Read.* County C.

Removal by recordare.

18. Cauſes are removed out of this court, by a writ of *recordare*, which iſſues out of the chancery, directed to the ſheriff, commanding him to ſend the plaint that is before him in his county court (without writ of *juſticies*) into the court of king's bench, or common pleas, to the end the cauſe may be there determined. And the ſheriff is hereupon to ſummon the other party to be in that court, (into which the plaint is to be ſent) at a day certain. And of all this he is to make certificate under his own ſeal, and the ſeals of four ſuitors of the ſame court. *Read.* County C.

Removal by pone.

19. Cauſes are alſo removed by *pone*, which differs in nothing from a *recordare*, but that it removes ſuch ſuits as are before the ſheriff by writ of *juſticies*, and a *recordare* is to remove the ſuit that is by plaint only, without writ. *id.*

Removal after diſcontinuance.

10. And altho' the plea be diſcontinued in the county, yet the plaintiff or defendant may remove the plaint into the common pleas or king's bench, and it ſhall be good, and he ſhall declare upon the ſame. *id.*

Outlawry pronounced.

21. In this court, after the *quinto exactus*, the coroner gives judgment of outlawry. 4 Inſt. 266.

Hundred court.

22. Out of the county court is derived the hundred court, for the eaſe of the ſubject; and it hath like juriſdiction as the county court, and may be held every three weeks. 2 Inſt. 71.

County hall. See *Shire hall.*

COUNTY RATE.

Several rates thrown into one general county rate.

THE ſeveral rates hereafter following, in order to avoid the inconveniencies of ſeparate collections, ſhall for the future be levied and raiſed by one general county rate

That is to ſay,

(1) For repairing county bridges, and highways thereto adjoining, and ſalaries for the ſurveyors of bridges; as directed by the 22 H. 8. c. 5. and 1 An. ſt. 1. c. 18.

*451 * (2) For building and repairing county gaols; by 11 & 12 W. c. 19.

(3) For repairing ſhire halls; by the 9 G. 3. c. 20.

(4) For the maſter of the houſe of correction his ſalary, and relieving the weak and ſick in his cuſtody; by the 7 J. c. 4.

(5) For relief of the priſoners in the king's bench and marſhalſea priſons; and of poor hoſpitals in the county, and of thoſe that ſhall ſuſtain loſſes by fire, water, the ſea, or other caſualties, and other charitable purpoſes for relief of the poor, as the juſtices in ſeſſions ſhall think fit; by the 43 El. c. 2. ſ. 15.

(6) For relief of priſoners in the county gaol; by the 14 El. c. 5.

(7) For the preſervation of the health of priſoners; by the 14 G. 3. c. 59.

(8) For the chaplain's ſalary of the county gaol; by the 13 G. 3. c. 58.

(9) For ſetting priſoners on work; by the 19 C. 2. c. 4.

(10) The treaſurer's ſalary; by the 12 G. 2. c. 29.

(11) Salary of perſons making returns of the prices of corn; by the 10 G. 3. c. 39.

(12) Charges attending the removal of any of the ſaid general county rates by *certiorari*; by the 12 G. 2. c. 29.

(13) Money for purchaſing lands at the ends of county bridges; by the 14 G. 2. c. 33.

(14) Charges of building or repairing houſes of correction, and for fitting up and furniſhing the ſame, and employing the perſons ſent thither; by the 17 G. 2. c. 5. ſ. 33.

(15) Charges of apprehending, conveying, and maintaining rogues and vagabonds; by the 17 G. 2. c. 5.

(16) Charges of the ſoldiers carriages, over and above the officers pay for the ſame, by the ſeveral yearly acts againſt mutiny and deſertion, and by the militia act of the 2 G. 3. c. 20.

(17) The coroner's fee of 9d a mile for travelling to take an inquiſition, and 20s for taking it; by the 25 G. 2. c. 29.

(18) Charges of carrying perſons to the gaol, or houſe of correction; by the 27 G. 2. c. 3.

(19) The gaoler's fees for perſons acquitted of felony, or diſcharged by proclamation; by the 14 G. 3. c. 20.

(20) Charges of proſecuting and convicting felons; by the 25 G. 2. c. 36. 27 G. 2. c. 3. 14 G. 3. c. 20. and 18 G. 3. c. 19.

*453 * (21) Charges of proſecuting and convicting perſons plundering ſhipwrecked goods; by the 26 G. 2. c. 19.

(22) Charges

(22) Charges of maintaining the militia men's families; by the ſeveral militia acts.

(23) Charges of bringing inſolvent debtors to the aſſizes, in order to their diſcharge, if themſelves are not able to pay; by the 32 G. 2. c. 28.

(24) The charges of tranſporting felons, or conveying them to the places of labour and confinement; by the 6 G. c. 23. & 19 G. 3. c. 74.

(25) Charges of carrying pariſh apprentices, bound to the ſea-ſervice, to the port to which the maſter belongeth; by the 2 & 3 An. c. 6.

2. And that the ſame may be collected with as much eaſe, and as little expence as poſſible, the juſtices at their general or quarter ſeſſions, or the greater part of them, ſhall have power to make one general rate to anſwer all the purpoſes aforeſaid. 12 G. 2. c. 29. ſ. 1. *Seſſions to lay the rate.*

Which rate ſhall be aſſeſſed in ſuch proportions in every pariſh or place, *as any of the rates by the ſaid ſeveral former acts have been uſually aſſeſſed.* id.

By which laſt words reference being made to the former acts, as to the manner of proportioning the rate, it is proper to inſert here how the caſe ſtands upon the ſaid former act, as to ſuch laying of the aſſeſſments; and it is thus:

(1) By the above mentioned act of the 22 H. 8. (in regard to *bridges*) the juſtices were to rate every inhabitant within their juriſdiction, in ſuch reaſonable ſum, as they ſhould think convenient. And by the 1 An. ſt. 1. c. 18. Every town, pariſh, or place was to be aſſeſſed as they uſually had been aſſeſſed towards the repair of bridges.

(2) By the 14 El. c. 5. (for *relief of priſoners*) the juſtices were to rate every pariſh at ſuch reaſonable ſums as they ſhall think convenient.

(3) By the 44 El. c. 2. (for *hoſpitals and the marſhalſea*) the ſame was to be rateably aſſeſſed upon every pariſh.

(4) By the 7 J. c. 4. (for *the maſter of the houſe of correction his ſalary*) the ſame was to be rated, as for hoſpitals and the marſhalſea, by the 43 El. c. 2.

(5) By the 19 C. 2. c. 4. (for *ſetting priſoners on work*) to be raiſed as other county charges.

(6) By the 11 & 12 W. c. 19. (for repairing gaols) to be aſſeſſed by the juſtices in equal proportions, on every hundred, ward, or other diviſion.

(7) And for *vagrants* (by the 12 An. now repealed) the money was to be raiſed as for bridges and gaols.

* So that upon the whole here ſeems to be intended an equal, proportionable rate, upon every diviſion. *453

Proportions in the ſeveral pariſhes cannot be altered.

H. 22 G. 3. K. v. Inhabitants of *St. Paul Covent Garden.* This was an appeal againſt the general county rate, made at the quarter ſeſſions for *Middleſex*; which rate was confirmed at the next general ſeſſions, and the following caſe ſtated.—That the pariſh of *St. Paul Covent Garden*, in the county of *Middleſex*, was aſſeſſed 69l 5s 7½d, altho' the annual rents or value of the lands and tenements therein aſſeſſed to the poor's rate do not amount to 32,000l; and that the pariſh of *St. Mary-le-bone* in the ſaid county was aſſeſſed to the ſame county rate 7l 5s 10d only, altho' the annual rents, or value of the lands and tenements in that pariſh, charged with the poor's rate, amounted to 140,000l, or thereabouts; wherefore the petitioners conceived the ſaid county rate to be unequal.—Upon hearing the appeal, it appeared to the court, that the allegations contained in the ſaid petition and appeal were true; but the court conceiving they were not authoriſed by 12 G. 2. or any other law, to vary the proportions of the county rate, as it hath continued in its preſent form ſince the year 1739, did therefore diſmiſs the ſaid appeal.—After hearing counſel on both ſides, L. *Mansfield* ſaid, There is great hardſhip in this caſe; but the point is ſettled by the authority in *Parker's Reports* 74, and we can give no relief. The diviſions of the land-tax were ſettled in 1694. By the increaſe of the metropolis it happened, that a great quantity of the land in *Weſtminſter* has ſince been built upon; but the act having laid the tax upon the diviſion, the diviſion is no further liable than before. In this caſe to be ſure the ſubject is different, but the reaſon is the ſame in both. By this act, county rates are to be collected in the ſame manner as rates have been *uſually* collected in the ſeveral diſtricts; upon pariſhes *eo nomine*, and not upon individuals. We have no authority to alter this proportion, notwithſtanding change of circumſtances, and though convinced that the equity of the caſe is with the appellants. Cal. Caſ. 158.

Places exempted from part of the rate.

3. And where any perſon, liberty, diviſion, or place hath uſually contributed, or is liable to pay, only to one or more of, and not to all the rates hereby intended to be raiſed and thrown into one general rate; the juſtices at their general or quarter ſeſſions may order and aſcertain, what proportion thereof ſhall be aſſeſſed on, and paid by ſuch perſon, liberty, diviſion, or place. 12 G. 2. c. 29. ſ. 5.

*454 * As for inſtance, where by the ſtatute of 22 H. 8. c. 5. towns corporate are charged for the repairing of bridges within their reſpective liberties; and the counties, for the bridges out of ſuch liberties; in ſuch caſe a town corporate ought not to be charged towards the bridges in the county at large; and conſequently ought to have an abatement in the rate charged upon them, in ſuch proportion as the expence of bridges is to the whole expence of the ſeveral articles charged upon the ſaid general county rate; as if the expence of bridges be a tenth part of the whole expence chargeable upon the county

county rate, then ſuch town corporate ſhall have an abatement of one ſhilling for every ten, which it would otherwiſe be charged with in ſuch rate.

Places exempt from the whole rate.

4. And by the 13 G. 2. c. 18. ſ. 7. Where any liberties or franchiſes have commiſſions within themſelves, and are not ſubject to the county juſtices, and do not, nor did before the 12 G. 2. contribute to the county rates; the juſtices within ſuch liberties may exerciſe the ſame powers within their liberties, as juſtices in their counties.

High conſtable to make demand.

5. Which ſaid rates the high conſtable ſhall, at ſuch times as the ſaid juſtices by their order in ſeſſions ſhall direct, demand of the churchwardens and overſeers; which demand ſhall be made in writing (A) and given to them, or any of them, or left at their dwelling houſes, or affixed on the church doors by the ſaid high conſtables. 12 G. 2. c. 29. ſ. 2.

Overſeers to pay.

6. Whereupon the ſaid churchwardens and overſeers ſhall in 30 days after ſuch demand made, of the money collected for relief of the poor, pay the ſums ſo aſſeſſed on each pariſh or place. 12 G. 2. c. 29. ſ. 2.

To be levied by diſtreſs.

7. And if the churchwardens or overſeers, or any of them, ſhall neglect or refuſe ſo to pay, the high conſtable ſhall levy the ſame by diſtreſs and ſale of the goods of ſuch churchwardens or overſeers ſo refuſing or neglecting, by warrant of two or more juſtices reſiding in or near ſuch pariſh or place. 12 G. 2. c. 29. ſ. 2.

High conſtable's receipt.

8. And the receipt of ſuch high conſtable ſhall be a full diſcharge to the churchwardens and overſeers, or other perſon paying the ſame. 12 G. 2. c. 29. ſ. 2.

Caſe where there is no poor rate.

9. Where there is no poor rate, the juſtices, in their general or quarter ſeſſions, ſhall by their order direct the ſum aſſeſſed on ſuch pariſh, townſhip, or place, to be rated and levied by the petty conſtable, or other peace officer, *as money for relief of the poor is by law to be rated or levied:* Which ſum ſo rated and levied ſhall be paid by him to the high conſtable, and ſhall be demanded of, paid by, or levied * on ſuch petty conſtable, in the ſame manner as before of the churchwardens and overſeers. And if any petty conſtable ſhall pay ſuch ſum before he hath collected it, he may afterwards rate and levy the ſame, or may be allowed and reimburſed the ſame, out of any conſtable's or other rate, which the juſtices in their ſeſſions ſhall order and direct. 12 G. 2. c. 29. ſ. 3. *455

As money for relief of the poor is to be rated or levied.] That is to ſay, by taxation of every inhabitant, parſon, vicar, and other, and of every occupier of lands, houſes, tithes, coal mines, or ſaleable underwoods. 43 El. c. 2. ſ. 1.

10. And

10. And whereas it will be inconvenient to many towns, pariſhes, and places, in the counties of *York*, *Derby*, *Durham*, *Lancaſter*, *Cheſter*, *Weſtmorland*, *Cumberland*, and *Northumberland*, that the ſaid rates ſhould be paid out of the poor rate; the juſtices at their general or quarter ſeſſions, *if they ſhall think convenient*, may order the ſum aſſeſſed on any ſuch town, pariſh, or place, to be paid by and levied on the petty conſtable [B] in ſuch manner as is above directed, in caſes where no rate is made for the poor. 12 G. 2. c. 29. ſ. 4. *Northern counties.*

If they ſhall think convenient.] By which words the juſtices in thoſe counties may order the rate to be paid by either of the two methods before mentioned, according to their diſcretions; that is to ſay, either by the churchwardens and overſeers out of the poor rate; or by the petty conſtables by an aſſeſſment after the manner of the poor rate. And the reaſon of this clauſe ſeems to be, becauſe ſome pariſhes in the northern counties being very large, and for that reaſon ſubdivided into ſeveral townſhips with regard to the poor, it may happen that ſome townſhips in the ſame pariſh may be high rated, and others low rated, towards the relief of their poor; therefore if a general ſum for the county rate upon the whole pariſh were to be charged upon all the inhabitants, in proportion to their poor rate, it would lay the burden very unequally. To remedy which, the juſtices by this clauſe may charge ſeparately ſuch ſum as they ſhall think reaſonable upon each ſubdiviſion or conſtablewick, in order to lay the ſame equally throughout the pariſh: and if any townſhip ſhall be aggrieved thereby, they may appeal as hereafter is directed, or remove it by *certiorari*.

High conſtable to pay to the treaſurer.

11. The ſaid high conſtables, at or before the next ſeſſions reſpectively after they have received the money, * ſhall pay the ſame to the treaſurer; and the money ſo paid, ſhall be deemed the publick ſtock. 12 G. 2. c. 29. ſ. 6.

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Treaſurer's receipt.

12. And the treaſurer's receipt ſhall be a ſufficient diſcharge to the high conſtable. 12 G. 2. c. 29. ſ. 9.

High conſtable to account.

13. And the ſaid high conſtable ſhall deliver in a true account on oath (if required) of the money by them received, before the ſaid juſtices at their general or quarter ſeſſions; and if any ſuch high conſtable ſhall neglect or refuſe to demand or levy as aforeſaid, or to account, the ſaid juſtices at their general or quarter ſeſſions may commit him to the common gaol, until he ſhall have cauſed ſuch rates to be demanded and levied, and ſhall have rendered a true account. And if it ſhall appear by ſuch account, that any ſum is remaining in his hands, and he ſhall not pay over the ſame to the treaſurer, they may commit him till he pay the ſame. 12 G. 2. c. 29. ſ. 8.

14. And

14. And the juſtices, at their general or quarter ſeſſions, may oblige by their order, the petty conſtables or any other perſon empowered to levy, collect, or receive any ſum for the purpoſes aforeſaid, and who have any ſum in their hands, to account and pay over the ſame, in like manner as the high conſtables. 12 G. 2. c. 29. ſ. 17. *Petty conſtables and others to account.*

15. And the treaſurer ſhall pay ſo much of the money in his hands, to ſuch perſons, as the juſtices in ſeſſions ſhall by their order from time to time appoint, for the uſes and purpoſes of the ſaid above mentioned acts, and for any other uſes and purpoſes to which the public ſtock of any county, city, diviſion or liberty, is or ſhall be applicable. 12 G. 2. c. 29. ſ. 6. *Treaſurer's diſburſements.*

16. And the treaſurer ſhall keep a book of entries, of the ſums by him received and paid; and ſhall deliver in a true account, on oath if required, of his receipts and diſburſements, to the juſtices at every general or quarter ſeſſions, and alſo the proper vouchers for the ſame, to be kept amongſt the records of the ſeſſions. 12 G. 2. c. 29. ſ. 7, 8. *Treaſurer's account.*

17. And the diſcharge of the ſaid juſtices, by their order at their general or quarter ſeſſions, ſhall be a ſufficient diſcharge to the treaſurer. 12 G. 2. c. 29. ſ. 9. *Seſſions order a diſcharge to the treaſurer.*

18. And no new rate ſhall be made, until it appear by the treaſurer's accounts, or otherwiſe, that three fourths of the money collected have been expended for the purpoſes aforeſaid. 12 G. 2. c. 29. ſ. 10. *New rate when to be made.*

19. If the churchwardens and overſeers of any pariſh or place, ſhall think ſuch pariſh or place is over-rated, they may appeal to the next general or quarter ſeſſions, againſt * ſuch part of the rate only as may affect ſuch pariſhes or places: but ſuch rate, upon the appeal, ſhall not be quaſhed in regard to any other pariſhes or places. 12 G. 2. c. 29. ſ. 12. *Appeal.*

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20. No *certiorari* to remove any rates, or any orders or other proceedings of the ſeſſions touching ſuch rates, ſhall be granted but upon motion the firſt week of the next term after the time for appealing from ſuch rates or orders is expired; and on making it appear to the court by affidavit or otherwiſe, that the merits of the queſtion on ſuch appeal or orders, will by ſuch removal come properly in judgment. And no ſuch *certiorari* ſhall be allowed, until ſufficient ſecurity be given to the treaſurer, in the ſum of 10*l*, to proſecute the *certiorari* with effect, and to pay the coſts if the rates or orders ſhall be confirmed. Nor ſhall any ſuch rates, orders, or proceedings be quaſhed for want of form only. 12 G. 2. c. 29. ſ. 21. *Certiorari.*

And no action ſhall be commenced againſt any perſon who ſhall have collected or received any money on any rate which ſhall be quaſh-

ed on a *certiorari* or otherwiſe, for any money collected or received on ſuch rate before the *certiorari* was brought; but the perſons who have paid on ſuch rate more than they ought to have paid, ſhall be repaid, or have the ſame allowed in the next rate. 12 G. 2. c. 29. ſ. 18.

A. *High Conſtable's warrant to levy the rate.*

Weſtmorland. } *To the churchwardens and overſeers of the poor of the*
Kendal Ward. } *townſhip* [or *pariſh*] *of* —— *in the ſaid county.*

BY virtue of an order of his majeſty's juſtices of the peace in and for the ſaid county, in their general quarter ſeſſions aſſembled, you are hereby required in thirty days time from your receipt of this precept, or otherwiſe having had due notice thereof, to pay to me, out of the money by you collected or to be collected for the relief of the poor, the ſum of —— being the proportion of your ſaid townſhip [*or* pariſh] for and towards the general county rate, for the repairing of bridges; repairing of the gaol, and for the relief of priſoners therein; and for the relief of the priſoners in the king's bench and marſhalſea priſons; repairing the ſhire hall; repairing and furniſhing the houſe of correction, with the ſalary of the keeper thereof; the treaſurer's ſalary; the coroner's fees; the charges concerning vagrants, ſoldiers carriages, convicting and tranſporting felons, and
*458 other * county charges. And herein you are not to fail, on the peril that ſhall enſue thereof. Given under my hand the —— day of ——

John Bracken, High Conſtable.

B. *Or, in the northern counties above mentioned, the juſtices, if they think proper, inſtead of ordering the money to be paid by the churchwardens and overſeers, may order it to be paid by the petty conſtables; and then the high conſtable's precept to the petty conſtables may be thus:*

Weſtmorland. } *To the conſtable of* —— *in the ſaid county.*
Kendal Ward. }

BY virtue of an order from his majeſty's juſtices of the peace in and for the ſaid county, in their general quarter ſeſſions aſſembled, you are hereby required to raiſe the ſum of —— within your conſtablewick, for which you are to make an equal rate within your ſaid conſtablewick, and to levy the ſame, in ſuch manner as money for the relief of the poor is by law to be rated or levied: which ſaid ſum you are to pay unto me, in thirty days time from your receipt of this

this precept, or otherwiſe having had due notice thereof; the ſame being the proportion of your ſaid conſtablewick, for and towards the general county rate, for the repairing of bridges ——.

And ſo repeat the ſeveral particulars as in the laſt precedent; and that for this reaſon, that the people may know what it is they pay their money for.

CUSTOMS.

THE laws relating to the cuſtoms, ſo far as juſtices of the peace, conſtables, and other ſuch officers, are concerned therein, being conſiderably connected with the laws of exciſe, it is thought proper to refer this ſubject to the title *Exciſe*, where the whole will be more clearly comprehended under one view.

*CUSTOS ROTULORUM. *459

BY the 37 *H.* 8. *c.* 1. (which was altered by the 3 & 4 *Ed.* 6. *c.* 1. but reſtored by 1 *W. c.* 21.) No perſon ſhall be appointed to the office of *cuſtos rotulorum*, but ſuch as ſhall have a bill ſigned with the king's hand for the ſame; which bill ſigned ſhall be a ſufficient warrant to the lord chancellor to make a commiſſion, aſſigning and authorizing thereby the ſame perſon to be *cuſtos rotulorum*, until the king hath by another bill with his own hand appointed one other perſon to have the ſame office, by himſelf, or his ſufficient deputy, learned in the laws, and meet and able to ſupply the ſaid office.

In purſuance whereof, the laſt clauſe in the commiſſion of the peace is generally to this effect: "Laſtly, we have aſſigned you "the aforeſaid ——— keeper of the rolls of our peace in our "ſaid county, and therefore you ſhall cauſe to be brought before "you and your ſaid fellows, at the days and places aforeſaid, the "writs, precepts, proceſſes, and indictments aforeſaid, that they "may be inſpected, and by a due courſe determined, as is afore-"ſaid."

Cyder. See *Exciſe*.

DEBTORS.

HOW priſoners for debt ſhall be demeaned. See title *Gaol.*

Inſolvent debtors brought to the aſſizes, in order to be diſcharged, ſhall pay for their bringing thither, not exceeding 12d a mile; and if they are not able to pay, then the ſame ſhall be paid by the treaſurer, out of the county ſtock. 32 *G.* 2. *c.* 28. *ſ.* 15.

Deer. See *Game.*

Defamation. See *Slander.*

DEMURRER.

A *Demurrer* (from *demorari*) ſignifies an abiding in point of law, upon which the defendant joins iſſue, * allowing the
*460 fact to be true as laid in the indictment. *Wood. b.* 4. *c.* 5.

In criminal caſes not capital, if the defendant demur to an indictment, the court will not give judgment againſt him to anſwer over, but final judgment. 2 *Haw.* 334.

But regularly in all caſes of felony, where a man pleads a ſpecial matter, tho' he conclude his plea with not guilty to the felony, or do not conclude it ſo, yet if his plea be tried, or found, or ruled againſt him, he ſhall be put to his plea of not guilty, and be tried for the felony; for tho' a man ſhall loſe his land, in ſome caſes, for miſpleading, yet he ſhall not loſe his life for miſpleading. 2 *H. H.* 257.

DEODAND.

1. DEODAND is, when any moveable thing inanimate, or beaſt animate, doth move to or cauſe the untimely death of any reaſonable creature, by miſchance, without the will or fault of himſelf, or of any perſon. 3 *Inſt.* 57.

2. This,

2. This, altho' it be not properly homicide, nor puniſhable as a crime, yet is taken notice of by the law, as far as the nature of the thing will bear, in order to raiſe the greater abhorrence of murder; and the unhappy inſtrument or occaſion of ſuch death is called a deodand (*deodandum*), and forfeited to the king, and was anciently paid into the hands of the king's almoner, to be applied to pious uſes for the ſoul of the deceaſed. Alſo all ſuch weapons, whereby one man kills another, are forfeited. 3 *Inſt.* 57. 1 *Haw.* 66. *Poſt.* 265.

3. This forfeiture is ſtill part of the caſual revenue of the crown, unleſs where lords of franchiſes are intitled to it by *grant*. For no man can *preſcribe* to it, or to the goods of ſelf-murderers or other felons, or of out-laws, happening within his royalty. *Poſt.* 265.

4. It ſeems clearly ſettled, contrary to the former opinions, that a horſe, or the like, killing an *infant* within the age of diſcretion, is as much forfeited as if he were of age. 1 *Haw.* 66.

5. Alſo, it was anciently holden, that things *fixed to the freehold*, as the wheel of a mill, or a bell hanging in the ſteeple, may be deodands; but by the later reſolutions they * cannot, unleſs * 461
they were ſevered before the accident happened. 1 *Haw.* 66.

6. It is agreed by all, that a *ſhip* in ſalt water, from which a man falls and is drowned, is not forfeited, becauſe perſons at ſea are continually expoſed to ſo many perils, that the law imputes not ſuch misfortunes to the ſhip. Alſo it ſeems clear, that when a man riding on a horſe over a river, is drowned thro' the violence of the ſtream, the horſe is not forfeited, becauſe not that, but the water cauſed his death. But it is ſaid, that a ſhip, by a fall from which a man is drowned, in the freſh water, ſhall be forfeited, but not the merchandize therein; becauſe they no way contribute to his death. And by the ſame reaſon it ſeems that if a man riding on the ſhafts of a waggon, fall to the ground and break his neck, the horſes and waggon only are forfeited, and not the loading, becauſe it no way contributed to his death; for which reaſon, where a thing not in motion cauſes a man's death, that part thereof only, which is the immediate cauſe, is forfeited. As where one climbing upon the wheel of a cart, while it ſtands ſtill, falls from it, and dies of the fall, the wheel only is forfeited: But if he had been killed by a bruiſe from one of the wheels being in motion, the loading alſo would have been forfeited, becauſe the weight thereof made the hurt the greater; and it is a general rule, that wherever the thing which is the occaſion of a man's death is in motion at the time, not only that part thereof which immediately wounds him, but all things which move together with it, and help to make the wound more dangerous, are forfeited alſo. 1 *Haw.* 66.

7. Thus a cart met a waggon loaded upon the road, and the cart endeavouring to paſs by the waggon, was driven upon an high bank and overturned, and threw a perſon that was in the cart,

cart, juſt before the wheels of the waggon, and the waggon run over him and killed him; it was reſolved in this caſe, that the cart, waggon, loading, and all the horſes were deodands, becauſe they all moved to the death. 1 *Salk.* 220.

8. If a weight of earth fall upon a worker in a mine, and kill him; the weight of the earth is forfeit, and not the whole mine. 1 *H.* H. 420.

9. In all theſe caſes, if the party wounded die not of his wound, within a year and a day after he received it, there ſhall be nothing forfeited, for the law doth not look on ſuch a wound as the cauſe of a man's death, after which he lives ſo long: But if the party die within that time, the forfeiture ſhall have relation to the wound
*462 given, and * cannot be ſaved by any alienation or other act whatſoever in the mean time. 1 *Haw.* 67.

10. However nothing can be forfeited as a deodand, nor ſeized as ſuch till it be found by the coroner's inqueſt to have cauſed a man's death; but after ſuch inquiſition, the ſheriff is anſwerable for the value of it, and may levy the ſame on the town where it fell, and therefore the inqueſt ought to find the value of it. 1 *Haw.* 67.

11. And if the coroner omits his duty in this caſe, the inquiſition may be made by the commiſſioners of gaol delivery, oyer and terminer, or of the peace. 1 *H. H.* 419.

12. After all, as this forfeiture ſeemeth to have been originally founded, rather in the ſuperſtition of an age of ignorance, than in the principles of ſound reaſon and policy, it hath not of late years met with great countenance in *Weſtminſter-hall.* And when juries have taken upon them to uſe a judgment of diſcretion, not ſtrictly within their province, for reducing the quantum of the forfeiture, the court of king's bench have refuſed to interpoſe in favour of the crown or lord of the franchiſe. In the caſe of *K.* and *Rolfe*, coroner of *Kent*, *H.* 5 G. 2. the coroner's inqueſt found, that a man ſitting on his waggon accidentally fell to the ground, and that the horſes drawing the waggon forward, one of the fore wheels cruſhed his head, of which he inſtantly died, and then concluded that only the wheel, on which they ſet a ſmall value, moved to his death. A motion was made, in behalf of Mr. *Mompeſſon*, lord of the franchiſe, for quaſhing this inquiſition, upon affidavits tending to ſhew, that the cart and horſes were equally inſtrumental, which indeed the finding of the jury did ſufficiently imply. But the court was very clear, that neither this court nor the coroner can oblige the jury to conclude otherwiſe than they have done, and would not ſuffer the affidavits for quaſhing the inquiſition to be read. A like caſe came on, *M.* 29 G. 2. *K.* and *Drew*, coroner of *Middleſex.* The coroner's jury, upon view of the body of a perſon killed by the like accident, found that only one wheel of the waggon moved to the death. The court, on motion in behalf of the franchiſe, granted a rule for ſhewing cauſe why the inquiſition ſhould not be quaſhed

quaſhed for this miſbehaviour of the jury. On the day for ſhewing cauſe, Mr. *Hume Campbell*, counſel for the lord of the franchiſe, informed the court, that upon looking into precedents, he was ſatisfied he could not ſupport the rule: and thereupon it was diſcharged. The caſe of the *King* and *Rolfe*, was mentioned on this occaſion, and greatly relied on. *Foſt.* 266.

Dice. See *Stamps.*

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*DISSENTERS. *463

I. Of proteſtant diſſenters in general.
II. Diſſenting miniſters.
III. Diſſenting ſchoolmaſters.

I. Of proteſtant diſſenters in general.

(1) BY the 1 *El. c.* 2. *ſ.* 14. Every perſon not having reaſonable excuſe, ſhall reſort to their pariſh church or chapel, or upon reaſonable let thereof, to ſome uſual place where common prayer ſhall be uſed, on every ſunday and holiday; on pain of puniſhment by the cenſures of the church, or for forfeiting for every offence 12d.

(2) By the 23 *El. c.* 1. Every perſon above the age of 16, who ſhall not repair to ſome church, or chapel, or uſual place of common prayer, ſhall forfeit for every month 20l. And if he ſhall forbear for 12 months he ſhall be bound to the good behaviour till he conform.

(3) By the 29 *El. c.* 6. Every offender in not repairing to church, having been once convicted, ſhall, without any other indictment or conviction, pay half yearly into the exchequer 20l. for every month afterwards, until he conform; which if he ſhall omit to do, the king may ſeize all his goods, and two parts of his lands.

(4) And

(4) And by 3 *J.* *c.* 4. The king may refuſe the 20l a month, and take two parts of the land, at his option.

(5) And by the 3 *J.* *c.* 5. No recuſant in not repairing to church, being convicted thereof, ſhall enjoy any publick office, or ſhall practice law or phyſic, or be executor, adminiſtrator, or guardian.

(6) And by the 35 *El.* *c.* 1. If any perſon refuſing to repair to church, ſhall be preſent at any aſſembly, meeting, or conventicle, under pretence of any exerciſe of religion, he ſhall be impriſoned till he conform; and if he ſhall not conform in three months, he ſhall abjure the realm; which if he ſhall refuſe to do, or after abjuration ſhall not go, or ſhall return without licence, he ſhall be guilty of felony without benefit of clergy. And whether he ſhall abjure or not, he ſhall forfeit his goods, and ſhall forfeit his lands during life.

(7) And by the 22 *C.* 2. *c.* 1. If any perſon, being ſixteen years of age, ſhall be preſent at any conventicle or meeting, under pretence of any exerciſe of religion, in other manner than ac-
*464 cording to the liturgy and practice of * the church of *England*, at which there ſhall be five perſons or more aſſembled, beſides thoſe of the houſhold, if it ſhall be in an houſe where there is a family; or if it be in a houſe, field, or place, where there is no family, then where any five perſons or more are ſo aſſembled,—every juſtice of the peace before whom information ſhall be made, ſhall (on pain of 100l, half to the informer) on proof by confeſſion, or oath of two witneſſes, or the notorious evidence of the fact, make record thereof (which ſhall be afterwards certified to the ſeſſions), which record ſhall be a full conviction: Whereupon he ſhall impoſe upon every offender a fine of 5s for the firſt offence, and for every other offence 10s, to be levied by diſtreſs and ſale of the goods of the offender, or in caſe of the poverty of ſuch offender, upon the goods of any other perſon then convicted of the like offence, ſo as the ſum to be levied on any one perſon in caſe of the poverty of other offenders amount not in the whole to above 10l on occaſion of any one meeting; one third to the king, one third to the poor, and one third to the informer and to ſuch perſons as the juſtice ſhall appoint, having regard to their diligence in diſcovering, diſperſing, and puniſhing of the ſaid conventicles.

And every perſon who ſhall ſuffer any ſuch meeting in his houſe, outhouſe, barn, or backſide, ſhall forfeit 20l in like manner; and in caſe of his inability, it ſhall be levied on the goods of ſuch perſons who ſhall be convicted of being preſent.

If the penalty exceeds 10l an appeal lies to the ſeſſions. And if the party is there found guilty by a jury, he ſhall pay treble coſts. And no other court whatſoever ſhall intermeddle, but the quarter ſeſſions only.

And juſtices and conſtables may with what force they think fit, upon refuſal to open, break open doors where they ſhall be informed ſuch conventicle is, and take the offenders into cuſtody. And

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on certificate from any juſtice of peace of his particular information or knowledge of ſuch unlawful meeting, and that he is not able, with ſuch aſſiſtance as he can get, to ſuppreſs the ſame; any commiſſioned officer of the militia, or other his majeſty's forces, with ſuch troops or companies of horſe and foot, and alſo the ſheriff, and other miniſters of juſtice, with ſuch other aſſiſtance, as they ſhall think meet, or can get in readineſs with the ſooneſt, ſhall repair to the place, and by the beſt means they can, ſhall diſſolve, diſſipate, and prevent ſuch meeting, and take the offenders into cuſtody.

Thus ſtood the laws at the revolution.

*Now by the 1 W. c. 18. commonly called the act of toleration, which by the 19 G. 3. c. 44. is declared to be a publick act, it is enacted, that neither the ſtatutes aforeſaid, nor any other made againſt papiſts and popiſh recuſants (except the 25 C. 2. c. 2. concerning the qualifying for offices, and 30 C. 2. ſt. 2. c. 1. containing the declaration againſt popery) ſhall extend to any perſon diſſenting from the church of *England*, who ſhall at the general ſeſſions of the peace to be held for the county or place where ſuch perſon ſhall live, take the oaths of allegiance and ſupremacy, and ſubſcribe the ſaid declaration againſt popery; of which the court ſhall keep a regiſter: and no officer ſhall take any fee above 6d for regiſtering the ſame, and 6d for a certificate thereof ſigned by ſuch officer. *465

Provided, that the place of meeting be certified to the biſhop of the dioceſe, or to the archdeacon of the archdeaconry, or to the juſtices of the peace at the general or quarter ſeſſions. And the regiſter or clerk of the peace ſhall regiſter or record the ſame, and give certificate thereof to any who ſhall demand the ſame; for which no greater fee ſhall be taken than 6d. And provided, that during the time of meeting, the doors ſhall not be locked, barred, or bolted.

T. 26 *G.* 3. *K. v. Hall. This was a conviction on* 22 *C.* 2. *c.* 1. *as follows:*

Parts of *Keſteven*, in the county of *Lincoln*. BE it remembered, that on the 2d day of *March* in the 26th year, &c. at *New Sleaford*, in the parts of *K.* aforeſaid, &c. *Robert Benſon* clerk, *came* before me *Richard Brown* eſquire, one of the juſtices, &c. and *gave* me the ſaid juſtice to underſtand and be informed, that one *Samuel Hall*, carpenter, being the occupier of a certain dwelling-houſe ſituate in the pariſh of *Heckington* in the parts and county aforeſaid, did wittingly and willingly ſuffer a meeting and unlawful aſſembly of divers perſons to be held in his ſaid dwelling-houſe, for the exerciſe of religious worſhip, in other manner than according to the liturgy and practice of the church of *England*, between the hours of one and eight o'clock in the afternoon of the ſame day; at which meeting and unlawful aſſembly, five perſons and more were aſſembled together, over and above thoſe of the ſaid *S. Hall*'s houſehold: (the dwelling-houſe in which the ſaid meeting and unlawful aſſembly was held, not being

certified to the biſhop of the dioceſe, or to the archdeacon of that archdeaconry, or to the juſtices of the peace at their general or quarter ſeſſions of the peace for the parts and county in which the ſaid
*466 meeting was held; nor regiſtered in the ſaid biſhop's or * archdeacon's court; nor recorded at the ſaid general or quarter ſeſſions); againſt the form of the *ſtatutes* in ſuch caſe made and provided, whereby the ſaid *S. Hall* hath forfeited the ſum of 20l, to be diſtributed, &c.——And now, on the 6th day of the ſaid month of *March*, in the twenty-ſixth year, &c. at, &c. came the ſaid *S. Hall* before me the ſaid juſtice, in purſuance of my ſummons, &c. when the ſaid information, *together with the examination in writing of Joſeph Wilkinſon and Joſeph Chamberlain*, both of *H.* aforeſaid, two *credible witneſſes*, taken upon their reſpective corporal oaths before me the ſaid juſtice, being openly read; *which ſaid examination* ſet forth, that on the ſaid 26th day of *February*, the ſaid *J. Wilkinſon* and *J. Chamberlain* went to the dwelling-houſe of the ſaid *S. Hall*, and that one *Joſeph Merryweathers* was preaching to the ſaid aſſembly; that the ſaid dwelling-houſe at which the ſaid meeting and aſſembly was holden, was not certified or regiſtered as by law required: and that they alſo ſaw there *Peter Jarvis*, *John Taylor*, *William Taylor*, and *Robert Bowles*, all of the ſaid pariſh of *H.* attending the ſaid meeting. And the ſaid *S. Hall* being now here *required* by me to *anſwer the premiſes*, *he the ſaid* S. Hall *pleadeth and confeſſeth the offence charged upon him* in and by the ſaid information. Wherefore, &c. he *hath forfeited* 20l.

Bearcroft took ſeveral objections to this conviction: 1ſt, The information is not in the *preſent* tenſe. It is ſtated, that the informer *came* before the juſtice, and *gave* him to underſtand, &c. 2dly, That the evidence was not given in the preſence of the defendant, which it ought to have been; the defendant ſhould have been called on to plead before the evidence was received, but the juſtice read over improper evidence, which ſhould not have been given, and then called on the defendant to anſwer the premiſes, by which means he was confounded and induced to plead guilty. 3dly, Though this is charged as an offence againſt *ſtatute* 22 *C.* 2. *only*, yet it concludes contrary to the *ſtatutes*, which is fatal. 4thly, The information does not contain a charge within the ſtatute 22 C. 2. c. 1. upon which the juſtice profeſſes to convict; and though it profeſſes to ſet out an offence againſt that ſtatute, yet it is not confined to that ſtatute only, but negatives ſeveral exceptions in 1 W. c. 18. Therefore, tho' it was not neceſſary to negative any of the exceptions under the latter act, yet having undertaken ſo to do, the omiſſion of any one is fatal, and it is not ſtated, *that he did not take the oaths*, &c. which is required by the 3d ſection of that ſtatute.——*Bulguy*, in ſupport of the conviction, was ſtopped by the *court*, who ſaid, that however inclined they were to
*467 *liſten to trivial objections to ſuch proſecutions, yet none of the preſent were ſufficient in point of law.——As to the firſt, the words objected to were better in the *paſt* than *preſent* tenſe, becauſe they referred to a

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time paſt, (viz.) the time of making the information. The 2d is cured by the defendant *pleading guilty*. As to the 3d and 4th, This is a conviction on 22 C. 2. therefore the exceptions in 1 W. c. 18. need not have been negatived, and may be rejected as ſurpluſage, for if a ſubſequent ſtatute make any exception to a former one, it is incumbent on the defendant to ſhew that he comes within ſuch exception. And beſides the 13 ſ. of 22 C. 2. directs, that that act ſhall be conſtrued moſt largely and beneficially for the ſuppreſſing of conventicles, &c. and that no proceedings thereupon ſhall be impeached for want of form. Conv. affirmed. Caſ. by Durnf. and Eaſt. 320.

And if any perſon diſſenting from the church of *England* as aforeſaid ſhall be appointed to the office of high conſtable, petty conſtable, churchwarden, overſeer of the poor, or any other parochial or ward office, and ſhall ſcruple to take upon him the office, in regard of the oaths or otherwiſe, he may execute the ſame by a ſufficient deputy, that ſhall comply with the laws on this behalf. Provided that the deputy be allowed and approved, by ſuch perſon, and in ſuch manner, as ſuch officer ſhould by law have been allowed and approved.

II. Diſſenting miniſters.

(1) By the 17 C. 2. c. 2. No perſon, who ſhall take upon him to teach or preach in any meeting or conventicle, under pretence of any exerciſe of religion, ſhall, unleſs only in paſſing upon the road, or unleſs required by legal proceſs, come within five miles of a city, town corporate, or borough, without taking an oath of allegiance therein mentioned; on pain of 40l, one third to the king, one third to the poor, and one third to him who ſhall ſue in the courts at *Weſtminſter*, aſſizes, or ſeſſions. And two juſtices, on oath of the offence, may commit him for ſix months.

(2) And by the 22 C. 2. c. 1. If any perſon ſhall take upon him to preach or teach in any meeting or conventicle, in other manner than according to the practice of the church of *England*, he ſhall forfeit for the firſt offence 20l, and for every other offence 40l. And if he be a ſtranger, or in the judgment of the juſtice of the peace before whom * he is convicted, unable to pay, it may be levied *468 on the goods of any perſon preſent.

(3) And by the 13 & 14 C. 2. c. 4. ſ. 14. No perſon ſhall preſume to conſecrate and adminiſter the ſacrament before he be ordained prieſt, according to the form and manner of the church of *England*, on pain of 100l.

Now by the aforeſaid act of toleration, and by the 19 G. 3. c. 44. No perſon diſſenting from the church of *England*, in holy orders, or pretended holy orders, or pretending to holy orders, nor any preacher or teacher of any congregation of diſſenting proteſtants, ſhall be liable to any of the aforeſaid penalties, who ſhall at the ſeſſions as aforeſaid of the place where he ſhall live, take the ſaid oaths of allegiance and ſupremacy, and ſubſcribe the declaration againſt popery, and alſo make and ſubſcribe a declaration in the words following: viz. "I *A. B.* "do ſolemnly declare, in the preſence of Almighty God, that "I am a chriſtian and a proteſtant, and as ſuch, that I believe "that the ſcriptures of the old and new teſtament, as commonly received among proteſtant churches, do contain the revealed "will of God; and that I do receive the ſame as the rule of "my doctrine and practice:" For the regiſtering of which he ſhall pay 6d to the officer of the court and no more, and 6d for a certificate thereof ſigned by ſuch officer.

And any preacher or teacher, duly qualified, ſhall be allowed to officiate in any congregation, although the ſame be not in the county where he was ſo qualified; provided that the place of meeting hath been duly certified and regiſtred; and ſuch teacher or preacher ſhall, if required, produce a certificate of his having ſo qualified himſelf, under the hand of the clerk of the peace where he was qualified; and ſhall alſo before any juſtice of ſuch county where he ſhall ſo officiate, make and ſubſcribe ſuch declaration, and take ſuch oaths as aforeſaid, if required. (10 An. c. 2. ſ. 9.)

And every ſuch teacher and preacher having taken the oaths, and ſubſcribed as aforeſaid, ſhall from thenceforth be exempted from ſerving in the militia of this kingdom, and from ſerving on any jury, or of being appointed to bear the office of churchwarden, overſeer of the poor, or any other parochial or ward office, or other office in any hundred, city, town, pariſh, diviſion, or wapentake.

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* III. *Diſſenting ſchoolmaſters.*

(1) By the 23 El. c. 1. If any perſon ſhall keep a ſchoolmaſter, who ſhall not repair to church, [or be allowed by the biſhop, he ſhall forfeit 10l a month, and the ſchoolmaſter ſhall be impriſoned for a year.

(2) By

(2) By the 17 C. 2. c. 2. No perſon ſhall be ſchoolmaſter, or take any boarders or tablers to be inſtructed by himſelf or any other, without taking an oath of allegiance therein mentioned, on pain of 40l.

(3) By the 13 and 14 C. 2. c. 4. Every ſchoolmaſter keeping any publick or private ſchool, and every perſon inſtructing or teaching any youth in any houſe or private family as a tutor or ſchoolmaſter, ſhall before his admiſſion ſubſcribe before the ordinary the declaration of conformity to the liturgy of the church of *England*, on pain of being diſabled to hold the ſaid ſchool. And if any ſchoolmaſter, or other perſon, inſtructing or teaching youth in any private houſe or family as tutor or ſchoolmaſter, ſhall teach any youth as tutor or ſchoolmaſter, before licence obtained from the biſhop or ordinary of the dioceſe, and before ſuch ſubſcription as aforeſaid; he ſhall for the firſt offence be impriſoned three months, for the ſecond and every other offence be impriſoned three months, and forfeit 5l.

But by the 19 G. 3. c. 44. No diſſenting miniſter, nor any other proteſtant diſſenting from the church of *England*, who ſhall take the aforeſaid oaths, and make and ſubſcribe the abovementioned declaration againſt popery, and the declaration herein before mentioned, ſhall be proſecuted in any court whatſoever, for teaching and inſtructing youth as a tutor or ſchoolmaſter.

Provided, that this ſhall not extend to the enabling any perſon diſſenting from the church of *England* to hold the maſterſhip of any college or ſchool of royal foundation, or of any other endowed college or ſchool for the education of youth, unleſs the ſame ſhall have been founded ſince the firſt year of king *William* and queen *Mary*, for the immediate uſe and benefit of proteſtant diſſenters.

Note, The forms of the ſaid oaths and declaration are inſerted in the title *Oaths*.

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*DISTRESS. *470

A Diſtreſs is the taking of a perſonal chattel out of the poſſeſſion of the wrong doer, into the cuſtody of the party injured, to procure a ſatisfaction for the wrong committed: and

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is of two kinds; either for cattle treſpaſſing and doing damage, or for nonpayment of rent or other duties.

The remedy for recovering rent by way of diſtreſs ſeems firſt to have come over to us from the civil law. For anciently in the feudal law, the not paying attendance at the lord's courts, or not doing the feudal ſervice, was a forfeiture of the eſtate: But theſe feudal forfeitures were afterwards turned into diſtreſſes, according to the pignorary method of the civil law; that is, the land that is let out to the tenants is hypothecated, as a pledge in his hands, to anſwer the rent agreed to be paid to the landlord, and the whole profits ariſing from the land are liable to the lord's ſeizure for the payment and ſatisfaction thereof.

Concerning which we will ſhew,

I. For what cauſes a diſtreſs ſhall be.
II. What goods may be diſtrained, and what not.
III. At what time the diſtreſs ſhall be taken.
IV. Where the diſtreſs ſhall be made.
V. That reaſonable diſtreſs ſhall be taken.
VI. Manner of making diſtreſs.
VII. Diſtreſs how to be demeaned.
VIII. Of reſcous and pound breach.
IX. Replevying the diſtreſs.
X. Sale of the diſtreſs.
XI. Irregularity in the proceedings.
XII. Landlord re-entering on nonpayment.
XIII. Caſe of tenant holding over.
XIV. Attorning to ſtrangers.
XV. Deſerting the premiſſes.
XVI. Rent in caſe of an extent or execution.
XVII. Rent on the death of tenant for life.
XVIII. Rent how far recoverable by executors or adminiſtrators.
XIX. Of diſtreſs by warrant of juſtices of the peace.

* I. For what cauſes a diſtreſs ſhall be. *471

Rent in arrear.

1. Diſtreſs for rent muſt be, for rent in arrear; therefore it may not be made on the ſame day on which the rent becomes due; for if the rent is paid in any part of that day, whilſt a man can ſee to count money, the payment is good.

Tender of payment.

2. It muſt not be after tender of payment; for if the landlord come to diſtrain the goods of his tenant for rent behind, before the diſtreſs the tenant may upon the land tender the arrearages, and if after that a diſtreſs be taken it is wrongful: and if the landlord have diſtrained; if the tenant, before the impounding thereof, tender the arrearages, the landlord ought to deliver the diſtreſs, and if he doth not, the detainer is unlawful. Even ſo it is, in caſe of a diſtreſs for damage feaſant (or damage done by cattle, treſpaſſing), the tender of amends before the diſtreſs, maketh the diſtreſs unlawful; and after the diſtreſs, and before the impounding, the detainer unlawful. 2 Inſt. 107.

But in this caſe, altho' the owner tender ſufficient amends, yet he cannot take his beaſts out of the pound, if the amends be refuſed; but he muſt replevy: and if it be found at the trial that the amends was not ſufficient, the perſon on whom they treſpaſſed ſhall have damages; if the amends tendered were ſufficient, then the owner of the beaſts ſhall have damages. *Dr. & St.* 112.

Seck rents and chief rents.

3. The like remedy may be had by diſtreſs, impounding and ſale; in caſes of rent-ſeck, rents of aſſize, and chief rents, as in caſe of rents reſerved upon leaſe. 4 G. 2. c. 28. ſ. 5.

Note, there are three kinds of rents; rent *ſervice*, rent *charge*, and rent *ſeck*.

Rent *ſervice* is, where the tenant holdeth his land of his lord by fealty and certain rent; or by homage, fealty, and certain rent; or by other ſervice, and certain rent. And it is called a rent ſervice, becauſe it hath ſome corporal ſervice incident to it, which at the leaſt is fealty. 1 Inſt. 141, 2.

Rent *charge* is ſo called, becauſe the land for payment thereof is charged with a diſtreſs; but before this act ſuch diſtreſs could not be ſold, but only detained till the rent ſhould be paid.

If the rent be reſerved, without any clauſe put in the deed of diſtreſs for the ſame, then it is called a rent *ſeck*, *redditus ſiccus*, or dry rent: and the difference between a rent charge and a rent ſeck is, that there is a clauſe of diſtreſs annexed to one, and no ſuch clauſe to the other; and therefore the one is a charge upon the land, but

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for the other the grantee had formerly no remedy but to charge the perſon of the grantor in a writ of annuity. 1 Inſt. 143.

*472 * Rents of *aſſize* are the certain rents of freeholders and ancient copyholders, ſo called, becauſe they are aſſized and certain, and thereby diſtinguiſhed from *reddítus mobiles*, farm rents for life, years, or at will, which are variable and uncertain. 2 Inſt. 19.

Agreement not by deed. 4. On a parol demiſe, or verbal leaſe, where the quantum of the rent agreed upon can appear in certain, the landlord may diſtrain: But whereas there are often difficulties when the agreement is not by deed, the landlord in ſuch caſe may recover a reaſonable ſatisfaction in an action on the caſe, for the uſe and occupation of the lands. And if in evidence on the trial, any parol demiſe, or any agreement (not being by deed) whereon a certain rent was reſerved, ſhall appear; the plaintiff ſhall not therefore be nonſuited, but may make uſe thereof as an evidence of the quantum of the damages to be recovered. 11 G. 2. c. 19. ſ. 14.

Rent reſerved on a leaſe for life. 5. So an action of debt may be brought againſt a tenant for life, in purſuance of the ſtatute of the 8 An. c. 14. which enacteth, that whereas before the ſaid ſtatute no action of debt did lie againſt a tenant for life or lives, for any arrears of rent during the continuance of ſuch eſtate for life or lives; it ſhall be lawful, for any perſon having any rent in arrear or due upon any leaſe or demiſe for life or lives, to bring an action of debt for ſuch arrears, in like manner as he might have done in caſe ſuch rent were reſerved upon a leaſe for years. ſ. 4.

Leaſe determined. 6. Perſons having rent in arrear, upon any leaſe determined, may diſtrain for ſuch arrears after the determination of the leaſe, in the ſame manner as if it had not been determined; provided that ſuch diſtreſs be made in ſix kalendar months after the determination of ſuch leaſe, and during the continuance of ſuch landlord's title or intereſt, and during the poſſeſſion of the tenant from whom ſuch arrear became due. 8 An. c. 14. ſ. 6, 7.

Leaſe renewed. 7. Whereas many perſons hold conſiderable eſtates by leaſes for lives or years, and leaſe out the ſame in parcels to ſeveral under tenants; and whereas many of thoſe leaſes cannot be renewed without a ſurrender of all the under leaſes derived out of the ſame, whereby it is in the power of any ſuch under tenants to prevent or delay the renewing of the principal leaſe; it is enacted, that in ſuch caſe, the chief leaſes may be renewed, without ſurrendering all the under leaſes; and the like diſtreſs or entry may be had, as if the former chief leaſe had been ſtill kept on foot and continued, or the under leaſes had been renewed under ſuch new principal leaſe. 4 G. 2. c. 28. ſ. 6.

8. Before

*8. Before the ſtatute of the 17 C. 2. c. 7. in caſe a diſtreſs was too little, where ſufficient diſtreſs was to be had, a man could not diſtrain again, be the demand never ſo great; for it was his folly that at firſt he diſtrained no more. *Mo.* 7. *Com.* 546. *Two diſtreſſes for one rent.*

But now, by the ſaid ſtatute, in all caſes where the value of the cattle diſtrained ſhall not be found to be to the full value of the arrears diſtrained for; the party to whom ſuch arrears were due, his executors or adminiſtrators, may diſtrain again for the reſidue of the ſaid arrears. ſ. 4.

So in like manner, where the diſtreſs is made by virtue of the warrant of a juſtice of the peace, in nature of an execution. And the diſtinction ſeemeth to be this: where a perſon hath an entire duty, he ſhall not ſplit the entire ſum, and diſtrain for part of it at one time, and for part of it at another time, and ſo *toties quoties*, for ſeveral times; for that is great oppreſſion. But if a man ſeizeth for the whole ſum that is due to him, and only miſtakes the value of the goods ſeized (which may be of very uncertain, or even imaginary value, as pictures, jewels, race horſes, and the like), there is no reaſon why he ſhould not afterwards complete his execution by making a further ſeizure. *Burrow.* Mansfield. 589.

9. If any diſtreſs and ſale ſhall be made, for rent in arrear and due, when none is in truth due, the owner ſhall recover double value with full coſts. 2 *W. Seſſ.* 1. c. 5. ſ. 5. *Diſtraining where no rent is due.*

And if the diſtreſs be taken of goods without cauſe, the owner may make *reſcous*; but if they be diſtrained without cauſe, and impounded, the owner cannot break the pound and take them out, becauſe they are in the cuſtody of the law. 1 Inſt. 47.

II. *What goods may be diſtrained, and what not.*

1. Diſtreſs for rent muſt be of a thing, whereof a valuable property is in ſomebody; and therefore dogs, bucks, does, conies, and the like, that are *feræ naturæ*, cannot be diſtrained. 1 Inſt. 47. *Valuable property.*

2. Altho' it be of valuable property, as a horſe; yet when a man or woman is riding on him, or an axe in a man's hand cutting of wood, and the like, they are for that time privileged, and cannot be diſtrained. 1 Inſt. 47. *Separate from the perſon.*

But it is ſaid, that if one be riding upon a horſe damage feaſant, the horſe may be led to the pound with the rider upon him. 1 *Sid.* 440, 442.

*474 * And it hath been held, that horſes joined to a cart, with a man upon it, cannot be diſtrained for rent, (altho' they may for damage feaſant); but both cart and horſes may, if the man be not upon the cart. 1 *Vent.* 36.

For maintenance of trades.

3. Valuable things ſhall not be diſtrained for rent, for benefit and maintenance of trades, which by conſequent are for the commonwealth, and are there by authority of law: as a horſe in a ſmith's ſhop ſhall not be diſtrained for the rent iſſuing out of the ſhop, nor an horſe in an hoſtry, nor the materials in a weaver's ſhop for making of cloth, nor cloth or garments in a taylor's ſhop, nor ſacks of corn or meal in a mill, nor any thing diſtrained for damage feaſant, for it is in cuſtody of the law; and the like. 1 Inſt. 47.

In the caſe of *Francis* and *Wyatt*, T. 4 G. 3. Mr. *Wyatt* the landlord diſtrained for rent a chariot of Mr. *Francis*, who thereupon brought a replevy; ſetting forth, that the coach houſe in which his chariot was taken, was part of certain other coach houſes and ſtables known by the appellation of the *Talbot livery ſtables*, whereof one *Matthew Wilkinſon* was the tenant and occupier under a demiſe from the ſaid Mr. *Wyatt* for a term of years, at the annual rent of 60l. That *Matthew Wilkinſon*, during ſuch his occupation of the premiſſes, uſed and followed the trade and buſineſs of a common public livery ſtable keeper, for keeping gentlemens' horſes and ſetting up their coaches and carriages: That the plaintiff Mr. *Francis* ſet up his chariot there, at livery, with the ſaid *Matthew Wilkinſon* as at a common public livery ſtable keeper's; and that the landlord Mr. *Wyatt* took his chariot, ſo ſtanding in the ſaid coach houſe, as a diſtreſs for rent due to him from the ſaid *Matthew Wilkinſon*, to the wrong and injury of the ſaid Mr. *Francis*. The queſtion was, Whether a gentleman's chariot, which ſtood in a coach houſe belonging to a common livery ſtable keeper, was diſtrainable for rent due to the landlord from the livery ſtable keeper.—For the plaintiff Mr. *Francis* it was argued, that the livery ſtable is exactly upon the foot of a common inn, and intitled to the ſame privileges and exemptions; and is equally to be protected, upon the principles of neceſſity, utility, and convenience to the community: and if horſes and carriages are not privileged therein, it will put an end to that branch of commerce. And the common caſes were cited, of goods carried to a fair or market, and the horſe carrying the ſame, of corn ſent to a mill, cloth to a taylor, wool ſent to be ſpun, ſtuffs ſent to a dyer, goods ſent by a carrier, or left at a common wharf; *475 all which * are privileged from diſtreſs.—For the landlord, it was argued, that theſe coach houſes are not in the nature of common inns, for the maſter of them is not bound to take in horſes and carriages as an innkeeper is, any more than the maſter of a public boarding ſchool is bound to receive all boarders, or a common brewer to ſerve all cuſtomers: That the right of putting up horſes and carriages in the one ariſes from private contract; in the other,

from

from authority of law, which is the ground of the protection extended to these houses by law. If indeed the plaintiff's carriage had been sent to a coachmaker's to be repaired, it might for the time have been privileged; but here is no such necessity. By hiring the coach house (whether by the week, the quarter, or the year) he becomes an under-tenant, and must be liable to the landlord's distress, as much as a man who hires an unfurnished room in a lodging house.—By lord *Mansfield* chief justice: Whatever may be the law of this case, it is worth the landlord's while to consider the consequences of taking such a distress, which will ruin his estate. For if it should be determined that carriages and horses standing at livery are liable to be distrained by the landlord for rent, the livery stables will be all deserted and undone; for no prudent man will make himself liable to such an hazard. Therefore let this case stand over for farther argument, and let the landlord in the mean time seriously consider how far in prudence he ought to press the question.—But Mr. *Francis* perceiving the opinion of the court to be against him, did not think proper to bring the matter to a further argument. And afterwards, in the Easter term following, the landlord moved for judgment, and judgment was given for him, upon the ground of its being part of the profits of the premisses; which distinguishes it from the case of goods sent to be manufactured, and the like. *Bur. Mansf.* 1498. *Black. Rep.* 483.

4. Beasts belonging to the plough shall not be distrained (which is the ancient common law of *England*, for no man shall be distrained by the utensils or instruments of his trade or profession, as the axe of the carpenter, or the book of a scholar) while goods or other beasts may be distrained. 1 Inst. 47. *Tools of a man's profession.*

But this rule holds only in distresses for rent arrear, amerciaments, and the like; but doth not extend to cases, where a distress is given, in the nature of an execution, by any particular statute, as for poor rates, and the like. 3 *Salk.* 136.

* So in the case of *Hutchins* and *Chambers*, E. 31 G. 2. On a special verdict: Several geldings were distrained for the poor rate, which were stated to be beasts of the plough and cart; when there were other goods more than sufficient to answer the value of the demand. It was objected, that by the statute of 51 H. 3. st. 4. (which was also in affirmance of the common law) *none shall be distrained by his beasts that* gaigne *his land.* In the argument of this cause, it was observed, that this duty on the statute of the 43 Eliz. is not a tax upon the land, nor payable out of it, but a charge upon the person: and it is a tax throughout the kingdom, and for publick benefit: That it is not to be considered upon the foot of a common law distress: That the nature, design, and end of this publick duty, required the most effectual and speedy remedy that could be devised: That the reason why beasts of the plough could not be distrained at common law, will not hold in the present case. *476

This is similar to an execution, and essentially different from a distress at common law. By the common law the distress could not be sold: It was only taken *nomine pœnæ*; not as a satisfaction (which this is) for the duty. The reasons for the privilege do not now hold. Agriculture then wanted and required encouragement, and must have been impeded by a common law distress: Now it doth not. Then, the thing distrained could not be sold, and remained useless: Now, it may be sold. This distress is not taken as a pledge, or a mean to compel; but for a satisfaction for the duty itself, a personal duty, and of a publick nature.—And by lord *Mansfield* Ch. J. This seising is but partly analogous to the common law distress; but is much more analogous to the common law execution. In the old common law distresses, which were in nature of a *nomine pœnæ* to compel payment, it would have been absurd to have suffered the implements by which a man gained his livelihood to be holden as a pledge; because that would have been taking from the man the only means he had of being able to pay the debt. But this reason doth not hold, where the things distrained may immediately be sold by way of satisfaction; which, tho' called a distress, yet really is, in this respect, an execution. And in cases of execution, beasts of the plough may be distrained, altho' there be other sufficient distress. And the court were unanimously of opinion, that beasts of the plough are distrainable under the statute of the 43 Eliz. and such like acts of parliament. *Burrow.* Mansfield. 579.

*477 *Things fixed to the fre hold.*

* 5. Furnaces, cauldrons, or other things fixed to the freehold, or the doors or windows of a house, or the like, cannot be distrained. 1 Inst. 47.

Things for which a replevin will not lie.

6. Things for which a replevin will not lie, so as to be known again, as money out of a bag, cannot be distrained. 2 *Bac. Abr.* 109.

But money in a bag sealed may be distrained; for that the bag sealed may be known again.

Corn or hay cut.

7. By the 2 W. sess. 1. c. 5. Persons having rent arrear on any demise, lease, or contract, may seize and secure any sheaves or cocks of corn or corn loose or in the straw, or hay being in any barn or granary, or upon any hovel, stack, or rick, or otherwise upon any part of the land charged with rent, and may lock up or detain the same in the place where found, in the nature of a distress; so as the same be not removed to the damage of the owner, out of the place where found and seized, but be kept there (as impounded) till replevied or sold. s. 3.

Corn or hay growing.

8. Also by the 11 G. 2. c. 19. The landlord may take and seize corn, grass, hops, roots, fruits, pulse, or other product growing, as a distress; and the same may cut, gather, make, cure, carry and lay

lay up, when ripe, in the barns or other proper place on the premiſſes; and if there ſhall be no barn or proper place on the premiſſes, then in any other barn or proper place which he ſhall procure, ſo near as may be to the premiſes; the appraiſement whereof ſhall be taken when cut, gathered, cured, and made, and not before. ſ. 8.

And notice of the place where the goods ſo diſtrained ſhall be lodged, ſhall in one week after the lodging thereof be given to the tenant, or left at the laſt place of his abode. ſ. 9.

Cattle depaſtured.

9. Generally, whatever goods and chattels the landlord finds upon the premiſſes, whether they in fact belong to the tenant or a ſtranger, are diſtrainable by him for rent; for otherwiſe a door would be opened to infinite frauds upon the landlord; and the ſtranger hath his remedy over by action on the caſe againſt the tenant, if by the tenant's default the goods are diſtrained, ſo that he cannot render them when called upon. 3 *Blackſt.* 8.

But on particular circumſtances perhaps a court of equity may relieve. As in the caſe of *Fowkes* and *Joyce*, T. 1 W. in the common pleas, a perſon driving ſheep to *London* to ſell, by agreement with the maſter of an inn, put them into the ground at ſo much a ſcore for a night. The landlord ſeeing them, aſked whoſe they were, but conſented to their ſtaying there, and afterwards diſtrained them for rent due * to him from the maſter of the inn. And it was adjudged for the landlord. 3 *Lev.* 260. 2 *Ventr.* 50.—But in the ſame caſe, upon a bill for relief in equity, the lords commiſſioners ſeemed to think, that the grounds lying to the inn, and uſed therewith, ought to have the ſame privilege, as the inn hath, and that paſſenger's cattle ought not to be diſtrainable there. 2 *Vern.* 129. ——And it appeared in this caſe, that on the landlord's coming and ſeeing the ſheep, he pretended to be angry. Upon which the owner offered to take out the ſheep, at which time they were not diſtrainable for the rent, having not been levant and couchant (that is, having not ſo long remained upon the ground, as to have laid down and riſen up again to feed). So that the court looked on the conſent as a fraud, to get them to be left all night, by which they became liable to the diſtreſs. And it was decreed, that the landlord ſhould anſwer for the value of the ſheep, and pay coſts both in law and equity. *Prec. Chan.* 7.

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Cattle eſcaped on the premiſſes.

10. Where a ſtranger's beaſts eſcape into the land, they may be diſtrained for rent, tho' they have not been levant and couchant, provided they are treſpaſſers: But if the tenant of the land is in default, in not repairing his fences, whereby the beaſts came into the land, the landlord cannot diſtrain ſuch beaſts, tho' they have been levant and couchant, unleſs he have cauſed notice to be given to the owner, and the owner ſuffers them to remain there afterwards. *Lutw.* 364.

But

But in caſe of an ancient ſeigniory, the lord may diſtrain cattle for ſervices, which came in by eſcape, tho' they were not levant and couchant, altho' it be in default of the fences, which the tenant of the land ought to maintain; becauſe the lord hath nothing to do with the repairing of the fences, and he hath no remedy but by diſtreſs: But the owner may prevent the diſtreſs, by making freſh purſuit; for then the cattle remain as it were in his own poſſeſſion. L. *Raym.* 168, 9. H. 8 W. Kemp. and Crews.

But in caſe of rent reſerved upon leaſe for years, the landlord cannot diſtrain ſuch cattle, until they be levant and couchant; for if the landlord had had the lands in his own hands, he ought to have repaired the fences; and when he puts in a leſſee, he ought by covenant to oblige him to repair: and therefore in that caſe, if the law would allow the landlord to diſtrain the cattle of a ſtranger which come in by eſcape, before that they be levant and couchant, it would be in effect to allow a man to take advantage of his own
*479 wrong. Therefore if the cattle come in by * default of the owner of the cattle, then they may be diſtrained before they be levant and couchant; and if in default of the tenant of the land, there they cannot be diſtrained until they have been levant and couchant, that is to ſay, for rent upon leaſes for years. And in ſuch caſe the landlord ſhall not take the cattle before that he has given notice to the owner, that they are upon the land liable to his diſtreſs; and if he doth not come to take them away, then they become diſtrainable. And by *Treby* chief juſtice; where the cattle eſcape accidentally, there they are not diſtrainable, until they have been levant and couchant; but if they eſcape by default of their owner, they are diſtrainable the firſt minute. *id.*

In the caſe of *Brodon* and *Pierce*. H. 1690, where a rent charge was arrear for 20 years, and cattle eſcaped out of the next ground, and were diſtrained: lord *Nottingham* (in equity) relieved againſt it. 2 *Vern.* 231.

Cattle damage feaſant.

11. If ten head of cattle were doing damage, a man cannot take one of them and keep it till he be ſatisfied for the whole damage; but he may bring an action of treſpaſs for the reſt. 12 *Mod.* 660. 1 H. 3 W. Vaſper and Edwards.

If a man hath common for ten cattle, and he puts in more; the ſurpluſage above ten may be taken damage feaſant. 1 *Roll's Abr.* 665.

If a man come to diſtrain, and ſee the beaſts in his ground, and the owner chace them out, of purpoſe before the diſtreſs taken; yet the owner of the ſoil cannot diſtrain them, and if he doth, the owner of the cattle may reſcue them; for the beaſts muſt be damage feaſant at the time of the diſtreſs. 1 Inſt. 161.

For diſtreſs damage feaſant is the ſtricteſt diſtreſs that is; and the thing diſtrained muſt be taken in the very act: for if the goods

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are once off, tho' on freſh purſuit, the owner of the ground cannot take them. 12 *Mod.* 661.

III. At what time the diſtreſs ſhall be taken.

For a rent or ſervice the lord cannot diſtrain in the night, but in the day time; and ſo it is of a rent charge; but for damage feaſant, one may diſtrain in the night; otherwiſe, it may be, the beaſts may be gone before he can take them. 1 Inſt. 142.

For before ſun riſing, or after ſun ſet, no man may diſtrain but for damage feaſant. *Mirrour.* c. 2. ſ. 26.

* *IV. Where the diſtreſs ſhall be made.* *480

Church lands.

1. The king's officers, as ſheriffs and others, ſhall not take diſtreſſes in the fees wherewith churches in times paſt have been endowed; but diſtreſſes may be taken in poſſeſſions of the church newly purchaſed. 9 Ed. 2. c. 9.

On the premiſſes.

2. A man may diſtrain in places or lands within the fee, liable to diſtreſs, and not elſewhere. 52 H. 3. c. 51. 2 Inſt. 131. Mir. c. 2. ſ. 26.

On the common.

3. And by the 11 G. 2. c. 19. The landlord may diſtrain any cattle or ſtock of the tenant, depaſturing on any common appendant or appurtenant, or any ways belonging to the premiſſes demiſed. ſ. 8.

In the highway.

4. No perſon (except the king's officers) ſhall take diſtreſſes in the king's highway. 52 H. 3. c. 15.

And the reaſon is, becauſe the king's ſubjects ought to have free paſſage, as well to fairs and markets, as about their other affairs. But yet this ſhall not be taken, to make the diſtreſs utterly unlawful, ſo as to take advantage thereof in bar to an avowry, but to this purpoſe, that if the lord diſtrain in the highway, the tenant may have an action againſt him upon this ſtatute. 2 Inſt. 131, 132.

Carried off the premiſſes.

5. But by the 11 G. 2. c. 19. If any tenant for life, years, at will, ſufferance, or otherwiſe, ſhall fraudulently or clandeſtinely convey off the premiſſes, his goods or chattels, to prevent the landlord from diſtraining; ſuch landlord, or any perſon by him lawfully impowered, may in 30 days next after ſuch conveying away, ſeize the ſame wherever they ſhall be found, and diſpoſe of them in ſuch manner, as if they had been diſtrained on the premiſſes. ſ. 1.

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But no landlord ſhall diſtrain any goods ſold *bona fide*, and for a valuable conſideration, before ſuch ſeizure made, to any perſon not privy to ſuch fraud. ſ. 2.

And if any tenant ſhall ſo fraudulently remove and convey away his goods or chattels, and if any perſon or perſons ſhall wilfully and knowingly aid or aſſiſt him in ſuch fraudulent conveying away or carrying off of any part of his goods or chattels, or in concealing the ſame; every perſon ſo offending ſhall forfeit to the landlord double the value of ſuch goods, to be recovered in any court of record at *Weſtminſter*. ſ. 3.

But if the goods and chattels ſo fraudulently carried off or concealed ſhall not exceed the value of 50l, the landlord or his agent may exhibit a complaint in writing (A) before two juſtices of the
*481 peace of the ſame county or diviſion, * reſiding near the place where ſuch goods and chattels were removed, or near the place where the ſame were found, not being intereſted in the lands or tenements whence ſuch goods were removed; who may ſummon (B) the parties concerned, examine the fact and all proper witneſſes upon oath, (or if it is a quaker, upon affirmation required by law;) and in a ſummary way determine whether ſuch perſon or perſons be guilty of the offence, with which he or they are charged, and to enquire in like manner of the value of ſuch goods and chattels; and upon full proof of the offence, by order (C) under their hands and ſeals the ſaid juſtices ſhall adjudge the offender or offenders to pay double the value of the ſaid goods and chattels, to ſuch landlord, his bailiff, ſervant, or agent, at ſuch time as the ſaid juſtices ſhall appoint: and if the offender or offenders, having notice of ſuch order, ſhall refuſe or neglect ſo to do, they ſhall by their warrant (D) levy the ſame by diſtreſs: and for want of ſuch diſtreſs (E) may commit the offender or offenders to the houſe of correction (F) there to be kept to hard labour, without bail or mainprize, for the ſpace of ſix months, unleſs the money ſo ordered to be paid as aforeſaid, ſhall be ſooner ſatisfied. ſ. 4.

H. 22 G. 3. *K.* v. *Morgan*. Two juſtices of the county of *Hereford*, convict *John Morgan* of *Michael Church* in the ſaid county, of knowingly and wilfully aiding and aſſiſting *John Morris* of *Llanbeder Painſcaſtle* in the county of *Radnor*, in fraudulently and clandeſtinely removing and conveying away certain goods and chattels, not exceeding the value of 50l, from off the farm of *Painſcaſtle*, &c. and in concealing and ſecreting the ſaid goods and chattels, at *Michael Church* aforeſaid, to prevent the landlord diſtraining the ſame for rent: and the ſaid juſtices order the ſaid *John Morgan* to pay 42l, being double of the value of the goods and chattels ſo taken away and concealed.——It having been objected at the ſeſſions, that it appeared upon the face of the conviction, to have been made by two juſtices of the county in which the goods *were found*, the ſeſſions quaſhed the conviction for want of juriſdiction in the juſtices.——*Willes* J. intimated, and it ſeemed to be agreed by the court, that the ſtatute gave an authority

thority to the juſtices of the reſpective counties, within which either offence under this act was proved to have been committed. But the court thought that the conviction was bad, as no evidence was ſtated in it, and as no ſpecial caſe was returned; they held, that it muſt be taken, that the conviction was quaſhed at the ſeſſions for that defect, for that the law preſumes, that * an inferior *482
juriſdiction acts rightly, unleſs the contrary appear. *Cal. Caſ.* 156.

Perſons aggrieved by order of ſuch juſtices, may appeal to the next general or quarter ſeſſions; who may give coſts to either party. ſ. 5.

And where the party appealing ſhall enter into recognizance, with one or two ſureties, in double the ſum ſo ordered to be paid, with condition to appear at ſuch ſeſſions; the order of the juſtices ſhall not be executed againſt him in the mean time. ſ. 6.

T. 29 & 30 G. 2. *K.* and *Biſſex.* Order made by two juſtices, reciting that a complaint had been made to them in writing, by *A. Clavey* againſt *J. Biſſex*, that he the ſaid *Clavey* demiſed his eſtate in the pariſh of *Shelley* in the county of *Somerſet*, to *William Thatcher*, at the yearly rent of 44l, and that there was due and in arrear from *Thatcher* to him for rent of the ſaid eſtate, on the fifth day of *April* laſt, 24l 15s 8½d; and that he the ſaid *Clavey* would have diſtrained the goods and chattels of the ſaid *W. Thatcher* upon the ſaid eſtate, in order to obtain ſatisfaction of the ſaid rent; but to prevent him from ſo doing, the ſaid *Biſſex*, on or about the 27th, 28th, and 29th days of *Auguſt* laſt, did knowingly and wilfully aid and aſſiſt the ſaid *Thatcher*, in fraudulently conveying and carrying off from the ſaid eſtate his the ſaid *Thatcher*'s goods and chattels, and alſo in concealing the ſame, being under the value of 50l, that is to ſay, two cows, one heifer, and ten hundred weight of cheeſe, of the value of 20l; whereby the ſaid *Clavey* was prevented from diſtraining the ſame, in order to obtain ſatisfaction for the ſaid rent, and contrary to the ſtatute 11 G. 2.; and therefore praying us to grant him our warrant of ſummons, requiring you the ſaid *J. Biſſex* to appear before us, and that we would examine the fact, and thereupon make ſuch order therein for his relief, as the ſaid ſtatute directs and requires, and as ſhould be agreeable to juſtice: Whereupon we the ſaid juſtices, reſiding near the ſaid eſtate from whence the ſaid goods and cattle were removed, and neither of us any way intereſted in the ſaid eſtate, did iſſue our warrant of ſummons, requiring you the ſaid *J. Biſſex* to attend us thereon to anſwer the ſaid complaint; and you having attended accordingly, and we in your preſence having examined the witneſſes produced by the ſaid *A. Clavey* upon oath, and heard what was alledged by you in your defence, do adjudge that the ſaid complaint is true; and that the ſaid goods and cattle of the ſaid *W. Thatcher*, which you ſo aided and aſſiſted * in conveying and carrying off from the ſaid eſtate, and alſo in *483
concealing the ſame, were of the value of 20l, and that you have

thereby forfeited double of the value of the ſaid goods and cattle, being the ſum of 40l, to the ſaid complainant *A. Clavey*, by virtue of the ſaid ſtatute: We therefore in purſuance of the ſaid ſtatute, do adjudge, order, and require you the ſaid *J. Biſſex*, within the ſpace of three days from the date hereof, to pay to the ſaid *A. Clavey* the ſum of 40l, which if you ſhall neglect to do, ſuch further proceedings will be then had againſt you to inforce the payment thereof, as the ſaid ſtatute directs and requires. Given under our hands and ſeals, this fifth day of *January* 1756.—This order was affirmed by the ſeſſions upon appeal. Both the orders were removed by *certiorari* into the king's bench. It was moved to quaſh the ſame. Objections taken: 1. The complaint is ſaid to be taken in writing, but not upon oath. 2. It is only ſaid, that he demiſed to *W. Thatcher*; but not ſaid for what eſtate or term. 3. It is ſtated, ſo much was due for rent, but not ſaid for what term; it might be due 20 years ago: It is not ſtated to be due, when *Thatcher* removed his goods. 4. The words of the order are, goods and *cattle*; of the ſtatute, goods and *chattels*. 5. No certain time is alledged when the defendant aided and aſſiſted; only ſaid, on or about the 26th, 27th, or 28th of *Auguſt*. 6. Not ſtated that *Thatcher* did carry off his goods: only that *Biſſex* did aid and aſſiſt him in carrying them off. 7. They adjudge the complaint true, but do not ſtate the evidence: and this is a conviction, not an order: and for any thing that appears, it might be upon *Clavey*'s evidence alone. 8. It is not ſtated that the goods were under the value of 50l, which is the ground of the juſtices juriſdiction. 9. The words of the ſtatute are, if any perſon ſhall be a tenant of any lands, tenements, or hereditaments: the word uſed in the order is *eſtate*; which may be a thing incorporeal, or may mean the intereſt in the land, and ſo not within the ſtatute. 10. It ſhould appear, whether the landlord has a right to diſtrain: by the 8 An. c. 14. the landlord may diſtrain at any time within ſix months after the expiration of the term: it doth not appear theſe ſix months were not expired; and if they were, this is no offence.——After conſideration, Mr. juſtice *Deniſon* delivered the reſolution of the court: I think the moſt material objection is, whether this is an order or a conviction. If a conviction, the evidence ought to have been ſet out. And there has been no doubt (notwithſtanding the caſe of *K.* and *Pulleine*, 1 *Salk.* 369.) that in a conviction the
*484 evidence muſt be ſet * out, that the court may judge upon it. So it was held by lord *Harwicke* in the caſe of *K.* and *Lloyd*, *Str.* 996. and in that caſe it was objected, that as it ſubjected the party to a penalty, tho' in the ſtatute it was called an order, yet it ſhould be conſtrued as a conviction: but the court ſaid, every act of the juſtices, which ſubjects the party to a penalty, ſhall not be conſtrued as a conviction. *K.* and *Venables*, *Str.* 630. 2 *L. Raym.* 1406. upon the ſtatute for licenſing alehouſes, conſidered as an order. *K.* and *Blackwell*, M. 4 Geo. which the court ſaid was a ſtrong caſe, and muſt

must be conſidered as an order. I underſtood from my lord *Hardwicke*, in the caſe of *K.* and *Lloyd*, that his ground of the difference was founded upon the expreſſions of the ſtatute, and not upon the penalty; as where the words of the ſtatute are, "of which "he ſhall be convicted," it is to be conſtrued as a conviction. Here it is extremely ſtrong; the ſtatute calls it an order: and in the nature of it, it is an examination upon a complaint. If the party was never ſummoned, this court upon affidavit will grant an information againſt the juſtices: but the ſummons need not be ſet out; and the court will intend the juſtices have done right, in caſe the contrary does not appear upon the face of the order. As to the firſt objection: this is not an information, but a complaint: when the party is ſummoned, the witneſſes are to be examined upon oath, but the complaint need not be upon oath. In anſwer to the 2d objection: as the order has followed the words of the ſtatute, we will not intend it a caſe wherein the juſtices had not a juriſdiction. The court will not, in caſe of an order, intend that the juſtices have done wrong. As to the third objection: it is ſufficiently alledged, in an order; his aſſiſting the tenant to carry away the goods, as it is here alledged, is ſufficient to ſhew the rent continued then to be in arrear; and the rather, as the defendant might have availed himſelf of the rent paid, by proving it before the juſtices. I much doubt, whether in a declaration it would not be ſufficient to ſay, the rent was in arrear at ſuch a day; and I think it would lie upon the defendant to prove that the rent does not remain in arrear. As to its not being ſaid, for what time the rent was due; this is mere matter of form. As to the 5th objection: *about*, in common parlance, means in this caſe three days or near it. They might be three days in carrying the goods away. The days are not material, even in legal proceedings. 1 *L. Raym.* 581. And in the caſe of *K.* and *Simpſon*, H. 3 Geo. 2. *Str.* 46. the day and hour in a conviction are not material. By this ſtatute no time is limited, * when the complaint ſhall be made: it may be made at any time. Suppoſe that the defendant had paid the penalty on a different complaint made, he might eaſily have ſhewn it. As to the 6th: the anſwer is obvious; If *Thatcher* had not carried his goods away, the defendant could not have aided in carrying them. The ſtatute makes two offences; one, carrying the goods away; the other, aiding in carrying them away. It is only neceſſary here to ſtate the offence which the defendant had been guilty of, which this order does in the words of the ſtatute. In the caſe of *K.* and *Monk*, M. 13 Geo. 2. there was a conviction for aiding and aſſiſting in killing a buck. It was objected, that it was not charged the buck was killed. But the court held, that as the conviction was in the words of the ſtatute, it was ſufficient. And the court held they were all principal, as well thoſe that killed the buck, as thoſe that aſſiſted. And this was the caſe of a conviction.—All the other objections may have this general anſwer; that in the caſe of orders,

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where the juſtices have juriſdiction, we will intend they have acted right; and if they have done wrong, they may be puniſhed by an information.——Let the orders be confirmed. *MS.*

So in the caſe of *K.* and *Middleburſt*, T. 30 & 31 G. 2. Two juſtices make an order againſt one *Thomas Middleburſt*, for wilfully and knowingly aiding or aſſiſting *John Cheſterton*, the tenant of Sir *Thomas Fleetwood*, in fraudulently removing and conveying away five cows and other goods, *or* in concealing the ſame. Which order on appeal to the ſeſſions, was confirmed. It was moved to quaſh theſe orders, upon two objections: 1. The whole adjudication refers to the complaint of one *Thomas Weſton*, wherein there is no charge upon *Cheſterton* the tenant at all: neither is it ſtated, that *Cheſterton* the tenant did remove the goods. 2. The act creates two offences, *viz.* aſſiſting in *removing*, and aſſiſting in *concealing* the goods. Now, it is not ſpecifically charged upon the defendant *Middleburſt*, that he wilfully and knowingly did either of theſe two things: It is only alledged that he wilfully and knowingly did one or the other. In 1 *Salk.* 371. *Rex* v. *Stocker*, an indictment for forging, *or* cauſing to be forged, was holden ill, becauſe the charge was in the disjunctive. So, 2 *Haw.* 225. An indictment charging a man disjunctively, is void. For the offences are diſtinct; and it appears not, of which of them the defendant is accuſed. So here, it doth not appear, of which of the two offences the juſtices have convicted him.——On a rule to ſhew cauſe,
*486 To the 1ſt objection, that it is not deſcribed * ſufficiently what the offence is; it was anſwered, that this is an order, and the court will not intend it to be ill. To the 2d objection, as to the charge being in the disjunctive, that he aſſiſted the tenant in removing *or* concealing the goods, it was anſwered, that the crime and the puniſhment are the ſame upon both; and the defendant was heard.—By lord *Manſfield* Ch. J. Upon indictments, it hath been determined, that an alternative charge is not good (as, forged *or* cauſed to be forged); tho' one only need be proved, if laid conjunctively (as, forged, *and* cauſed to be forged): but I do not ſee the reaſon of it: the ſubſtance is exactly the ſame; the defendant muſt come prepared againſt both: and it makes no difference to him in any reſpect. But this is an order: and being good in ſubſtance, needs not be literally ſo ſtrict.—And by the court, the rule to ſhew cauſe was diſcharged, and conſequently both orders affirmed. *Burrow*, Mansfield. 399.

THE following form of a conviction, drawn by the late Mr. ſerjeant *Poole*, ſeeming to be very accurate and judicious, may be uſeful as a precedent in this and other like caſes.——"*Lancaſhire*, to wit. Be it remembred, that on the 25th day of September in the twelfth year of the reign of our lord the preſent king, at *Liverpoole* in the county of *Lancaſter*, *Samuel Brown* of *Liverpoole* aforeſaid cometh before us *John Goodwin* and *Richard Gildart*, eſquires, juſtices of the lord the preſent king aſſigned to keep the peace in and for

for the county aforesaid, and also to hear and determine divers felonies, trespasses and other offences committed in the said county, and residing near to the close from whence the mare herein after mentioned was conveyed away, we or either of us not being interested in that close, and then and there exhibiteth before us a certain complaint in writing against *John Ellison* of *Liverpoole* aforesaid labourer, by which he giveth us to understand and be informed, that he the said *Samuel Brown*, on the second day of February in the year of our Lord 1738, at *Liverpoole* aforesaid, had demised to one *Thomas Ellison* a certain close of pasture called ——— containing by estimation ——— acres, with the appurtenances, of the said *Samuel*, situate, lying, and being in *Liverpoole* aforesaid, near to a certain place there called the Loggerheads, to hold the same to the said *Thomas Ellison* from thenceforth for one whole year from thence next ensuing, and fully to be compleat and ended, at and under the yearly rent of six pounds seventeen shillings and sixpence, to be paid by the said *Thomas Ellison* to the said *Samuel* at two payments in the year, to wit, upon the first day of August and upon the second day of February called Chandlemass-day by equal * portions, the first payment whereof was to begin and be made on * 487 the first day of August then next following; and that by virtue of that demise the said *Thomas Ellison* entred into the said close and was possessed thereof; and that on the first day of August now last past, the sum of three pounds eight shillings and nine pence of the rent aforesaid was and became due and in arrear to the said *Samuel Brown* from the said *Thomas Ellison* for half a year ended at that day in the year aforesaid and yet is unpaid; and that after the said sum of three pounds eight shillings and ninepence of the rent aforesaid so became due and in arrear to the said *Samuel Brown*, and whilst the same was due to him and unpaid, to wit, on the ——— day of August now last past, one bay mare of the said *Thomas Ellison*, under the value of 50l, that is to say, of the value or price of four pounds and four shillings, was depasturing and feeding upon the said demised premisses, and was then subject and liable to be taken as a distress for the said arrear of rent so due and payable; and that the said *Thomas Ellison*, to prevent the said *Samuel Brown* from distraining the said mare for the said arrear of rent so reserved due and payable as aforesaid, afterwards, that is to say, on the same day and year last mentioned, fraudulently and clandestinely conveyed away the said mare off and from the said demised premisses, and hath ever since that time concealed the same; and that one *John Ellison* of *Liverpoole* aforesaid labourer, well knowing the premisses, did wilfully aid and assist the said *Thomas Ellison*, in the fraudulent conveying away the said mare off and from the said demised premisses, and in concealing the same; and thereupon, afterwards, that is to say, on the sixth day of October in the same year, at *Liverpoole* aforesaid, the said *John Ellison* and the said *Samuel Brown*, being in that behalf in due manner summoned, come before us the

said

ſaid juſtices in their proper perſons on occaſion of the ſaid complaint; and one *Richard Bradley* and one *Chriſtopher Clitherall*, being credible witneſſes in that behalf, likewiſe then and there come before us, and then and there take their corporal oaths, and each of them then and there taketh his corporal oath, upon the holy goſpel of God, to ſpeak the truth of and upon the premiſſes in the ſaid complaint ſpecified before us the ſaid juſtices then having ſufficient power and authority to adminiſter the ſaid oaths to them the ſaid *Richard Bradley* and *Chriſtopher Clitherall* in that behalf; and the ſaid *Richard Bradley* and *Chriſtopher Clitherall* then and there are examined before us upon their ſaid oaths, and each of them is
*488 examined before us upon his oath of and upon the * premiſſes in the ſaid complaint ſpecified; and the ſaid *John Elliſon* being then and there preſent before us the ſaid juſtices in his proper perſon on occaſion of the ſaid complaint; and the complaint aforeſaid and the examination of the ſaid *Richard Bradley* and *Chriſtopher Clitherall* of and upon the premiſſes, and the evidence of the ſaid *Richard Bradley* and *Chriſtopher Clitherall* thereupon then and there given upon their ſaid oaths, being heard and fully underſtood by the ſaid *John Elliſon*; he the ſaid *John Elliſon* by us the ſaid juſtices is then and there required if he hath or knoweth any thing to ſay for himſelf, why he the ſaid *John Elliſon* ought not to be convicted of the premiſſes aforeſaid above laid to his charge; and becauſe upon hearing and fully underſtanding the ſaid complaint and the evidence of the ſaid *Richard Bradley* and *Chriſtopher Clitherall* of and upon the premiſſes given before us upon their ſaid oaths, and alſo upon hearing and fully underſtanding all and ſingular the matters and things by the ſaid *John Elliſon* alledged in his defence of and upon the premiſſes, it appears manifeſtly to us, that the ſaid *John Elliſon* is guilty of the premiſſes above laid to his charge in manner and form as by the ſaid complaint is above alledged; and becauſe upon enquiry made by us the ſaid two juſtices on the oath of the ſaid *Chriſtopher Clitherall* in that behalf likewiſe in due manner taken before us the ſaid juſtices then having power and authority to adminiſter that oath to him the ſaid *Chriſtopher* in that behalf, it manifeſtly appears to us the ſaid juſtices, that the ſaid mare in the ſaid complaint mentioned, at the time of conveying the ſame away as in the ſaid complaint is mentioned, was of the value of four pounds and four ſhillings of lawful money of this realm: Therefore it is conſidered by us the ſaid juſtices, and we the ſaid juſtices do order and adjudge, that the ſaid *John Elliſon* be convicted of the premiſſes by the complaint aforeſaid ſo as aforeſaid laid to his charge; and that he pay to the ſaid *Samuel Brown* the ſum of eight pounds and eight ſhillings of lawful money of Great Britain on the ——— day of ——— now next enſuing, being double the value of the ſaid mare in the ſaid complaint mentioned, according to the form of the ſtatute in that behalf made and provided. In witneſs whereof we the ſaid juſtices have hereunto

unto put our hands and ſeals this ſixth day of October in the thirteenth year of the reign of our lord George the ſecond, king of Great Britain, France, and Ireland, defender of the faith, and ſo forth, and in the year of our Lord one thouſand ſeven hundred and thirty-nine.

* V. *That reaſonable diſtreſs ſhall be taken.* *489

Diſtreſſes ſhall be reaſonable and not too great; and he that taketh great and unreaſonable diſtreſſes, ſhall be grievouſly amerced. 52 H. 3. c. 4. *Diſtreſs to be reaſonable.*

For example, if the lord diſtrain two or three oxen for 12d, or the like ſmall ſum, and the owner bring a replevy of the oxen, and the lord avow the taking of them for the 12d; of his own ſhewing, he ſhall make fine: or the party may have his action upon this ſtatute. 2 Inſt. 107.

If the lord diſtrain an ox, or horſe, for a penny; if there were no other diſtreſs upon the land holden, the diſtreſs is not exceſſive: but if there were a ſheep, or a ſwine, or the like, then the taking of the ox or horſe is exceſſive, becauſe he might have taken a beaſt of leſs value. 2 Inſt. 107.

VI. Manner of taking diſtreſs.

1. Gates or incloſures may not be broken open, nor thrown down, to make a diſtreſs. 1 Inſt. 161. *Breaking gates.*

2. Nor may the leſſor enter into the tenant's houſe, unleſs the doors are open. *Read.* Diſtr. 2 *Bac. Abr.* 111. *Opening doors.*

Upon a queſtion about taking a diſtreſs, it was held by the lord chief juſtice *Hardwicke*, at the ſummer aſſizes at *Exeter*, 1735, that a padlock put on a barn door could not be opened by force, to take the corn by way of diſtreſs. 9 *Viner.* 128.

But if the outer door of an houſe is open, one may break an inner door to take a diſtreſs. *Caſes in the time of lord Hardwicke.* 168.

3. Where any goods or chattels fraudulently or clandeſtinely conveyed or carried away, ſhall be put, placed, or kept in any houſe, barn, ſtable, outhouſe, yard, cloſe, or place, locked up, faſtened, or otherwiſe ſecured, ſo as to prevent ſuch goods or chattels from *Aid of the conſtables and juſtices.*

from being taken and ſeized as a diſtreſs for arrears of rent; it ſhall be lawful for the landlord, or his ſteward, bailiff, receiver, or other perſon or perſons impowered, to take and ſeize as a diſtreſs for rent, ſuch goods and chattels (firſt calling to his aſſiſtance the conſtable, headborough, borſholder or other peace officer of the hundred, diſtrict, or place, where the ſame ſhall be ſuſpected to be concealed, and in caſe of a dwelling houſe, oath being alſo firſt made (G) before a juſtice of the peace, of a reaſonable ground to ſuſpect that ſuch goods or chattels are therein) in the day time to
*490 break * open (H) and enter into ſuch houſe, barn, ſtable, out-houſe, yard, cloſe, and place; and to take and ſeize ſuch goods and chattels for the ſaid arrears of rent, as he might have done if they had been in any open place. 11 G. 2. c. 19. ſ. 7.

But except it be in this caſe where the goods are clandeſtinely conveyed, it may ſeem from what hath been ſaid, that the landlord hath no mean to come at the goods in order to make diſtreſs, if the tenant ſhall think fit to lock up his gates, and ſhut the doors: And the like may be obſerved in caſes of diſtreſs for the levying a penalty, by warrant of juſtices of the peace (unleſs ſuch penalty, or part thereof, be given to the king. Which matter may ſeem to require ſome conſideration.

Part in the name of the whole.

4. If a landlord comes into a houſe, and ſeizes upon ſome goods as a diſtreſs, in the name of all the goods of the houſe; that will be a good ſeizure of all. 6 *Mod.* 215.

VII. Diſtreſs how to be demeaned.

Impounding off the premiſſes.

1. By the 52 H. 3. c. 4. "None ſhall cauſe "any diſtreſs that he hath taken, to be driven out "of the county where it was taken: and if one "neighbour do ſo to another of his own autho-"rity (*as for damage feaſant, or rent charge,* 2 *Inſt.* 106.) he ſhall "make fine as for a thing done againſt the peace; and if the lord "ſo preſume to do againſt the tenant, he ſhall be grievouſly pu-"niſhed by amerciament."

Before this act, at the common law, a man might have driven the diſtreſs to what county he pleaſed: which was miſchievous, for two cauſes; 1. Becauſe the tenant was bound to give the beaſts being impounded in an open pound ſuſtenance, and being carried into another county, by common intendment he could have no knowledge where they were. 2. He could not know where to have a replevy; but the party was, before this ſtatute, driven to his action upon his caſe. 2 Inſt. 106.

And albeit this ſtatute be in the negative, yet if the tenancy be in one county, and the manor in another county, the lord may drive the diſtreſs which he taketh in the tenancy to his manor in the other county; for that the tenant is out of both the ſaid miſchiefs for the tenant by doing of ſuit and ſervice to the manor, by common intendment may know what is done there, and therefore may give his beaſt ſuſtenance. And to know where to have his replevy, the bailiff of the manor uſually drives the cattle diſtrained to the pound of the manor. And hereby it * is to be noted, that a caſe out of the miſchief, is out of the meaning of the law, tho' it be within the letter. 2 Inſt. 106. *491

And by the 1 & 2 P. & M. c. 12. *It is further enacted, that* "no diſtreſs of cattle ſhall be driven out of the hundred, rape, "wape take, or lathe, where ſuch diſtreſs ſhall be taken, except "it be to a pound overt within the ſame ſhire, not above three "miles diſtant from the place where the ſaid diſtreſs was taken; "and no cattle or other goods diſtrained for any cauſe at one time, "ſhall be impounded in ſeveral places, whereby the owner may "be conſtrained to ſue ſeveral replevies; on pain of 100s to the "party grieved, and treble damages." ſ. 1.

T. 21 G. 2. *Gimbart* and *Pelah*. The defendant juſtified impounding cattle damage feaſant. And on evidence it appeared, he put them into the next pound, though it happened to be in another county. And *Lee* Ch. J. held, it did not make him a treſpaſſer, though it ſubjected him to the penalty of the ſtatute of the 1 & 2 P. & M. Str. 1272.

Note, a pound is either *overt* or open, as in a pinfold made for ſuch purpoſes, or in his own cloſe, or in the cloſe of another by his conſent; and it is therefore called open, becauſe the owner may give his cattle meat and drink, without treſpaſs to any other, and then the cattle muſt be ſuſtained at the peril of the owner: Or it is a pound *covert* or cloſe, as to impound the cattle in ſome part of his houſe; and then the cattle muſt be ſuſtained with meat and drink at the peril of him that diſtraineth, and he ſhall not have any ſatisfaction therefore. 1 Inſt. 47.

But if the diſtreſs be of utenſils of houſhold, or ſuch like dead goods, which may take harm by wet or weather, or be ſtolen away, there he muſt impound them in a houſe, or other pound *covert*, within three miles in the ſame county; for if he impound them in a pound *overt*, he muſt anſwer for them. 1 Inſt. 47.

2. By 11 G. 2. c. 19. Any perſon diſtraining, may impound or otherwiſe ſecure the diſtreſs, of what kind ſoever it be, in ſuch place, or on ſuch part of the premiſſes, as ſhall be moſt convenient; and may appraiſe, and ſell the ſame, as any perſon before might have done off the premiſſes. ſ. 10. *Impounding on the premiſſes.*

3. Cattle diſtrained may not be worked or uſed, unleſs for the owner's benefit, as a cow milked, *Uſing the goods diſtrained.*

or the like; much leſs may they be abuſed or hurt. *Cro. Jac.* 148.

And it hath been ſaid in this caſe, that even a cow may not be
*492 milked; for tho' the cow be better for this, yet he * who took the diſtreſs ought not to do good to the owner without his conſent, and perhaps the owner would have come before any damage came by this to the cow; and if it periſh by this, yet he who took the diſtreſs may diſtrain again. 2 *Bac. Abr.* 112.

Diſtreſs dying.

4. So if the diſtreſs be loſt by the act of God: as if the diſtreſs dies in the pound, without any default in the diſtrainer; in ſuch caſe, he who made the diſtreſs may diſtrain again. 1 *Salk.* 248.

Killed.

5. It is the diſtrainer's own fault, if he puts the diſtreſs in a pound which will not hold it; but he cannot juſtify the tying of cattle in the pound; and if he ties a beaſt, and it is ſtrangled, he muſt pay damages. 1 *Salk.* 248.

VIII. Of reſcous and pound breach.

Reſcous and pound breach.

1. By the common law, if a man break the pound, or the lock of it, or part of it, he greatly offendeth againſt the peace, and doth treſpaſs to the king, and to the lord of the fee, and to the ſheriffs, and hundredors, in breach of the peace, and to the party, and to the delaying of juſtice; and therefore hue and cry is to be levied againſt him as againſt thoſe who break the peace. *Mir.* c. 2. ſ. 26. And the party who diſtrained may take the goods again, whereſoever he ſhall find them, and impound them again. 1 Inſt. 47.

2. And by ſtatute, on any pound breach or reſcous, of goods diſtrained for rent, the perſon grieved thereby, ſhall in a ſpecial action upon the caſe, recover treble damages and coſts againſt the offender, or againſt the owner of the goods, if they be afterwards found to have come to his uſe or poſſeſſion. 2 W. c. 5. ſ. 4.

Treble damages and coſts] In the caſe of Sir *Wilfred Lawſon* v. *Storey*, M. 6 W. It was adjudged, that the coſts ſhall be trebled as well as damages. L. *Raym.* 20.

3. When a man hath taken diſtreſs, and the cattle diſtrained, as he is driving them to the pound, go into the houſe of the owner; if he that took the diſtreſs demand them of the owner, and he deliver them not, this is reſcous in law. 1 Inſt. 161.

IX. *Replevying the diſtreſs.*

Replevy.

1. It is worthy of obſervation, how provident the law is, that mens beaſts, cattle, or other goods be not unjuſtly or exceſſively diſtrained; and if they be, that deliverance * be ſpeedily made of them by replevy (or taking back the pledge): otherwiſe the huſbandry of the realm, and mens other trades, might be overthrown or hindred. 2 Inſt. 137. *493

2. To which purpoſe, it is enacted by the 1 & 2 P. & M. c. 12. that the ſheriff of every county ſhall, at his firſt county day, or in two months after he hath received his patent of office, appoint and proclaim in the ſhire town four deputies at the leaſt, dwelling not above 12 miles one diſtant from another, to make replevies; on pain of 5l for every month that he ſhall lack ſuch deputy or deputies, half to the king, and half to him that ſhall ſue in any court of record. ſ. 3.

3. And the *ſheriff, or other officer* having authority to grant replevins, ſhall in every replevin of a diſtreſs for rent, take in his own name, from the plaintiff and two ſureties, a bond in double the value of the goods diſtrained, to be aſcertained on the oath of one witneſs, and conditioned for proſecuting the ſuit with effect, and without delay, and for duly returning the goods diſtrained, in caſe a return ſhall be awarded; before any deliverance be made of the diſtreſs; and the ſheriff ſhall aſſign ſuch bond *to the avowant, or perſon making conuſance.* 11 G. 2. c. 19. ſ. 23.

Sheriff or other officer] T. 18 G. 3. *Richards* and *Acton.* A rule was made on *Joſeph Garmeſon* the replevin clerk, *Robert Jeffreys* the under ſheriff, and *Edward Pembury* the clerk of the county court, to diſcover the names of the pledges taken upon granting the replevin in this cauſe, and to ſhew cauſe why they ſhould not pay the defendant 57l 15s, being the damages and coſts recovered by him in this cauſe, together with the coſts of the application. The diſtreſs was for rent; and on replevin brought, the defendant had a verdict with the damages and coſts abovementioned. On application to *Garmeſon* for the names of the pledges, he from time to time evaded and delayed to doing; having it was ſuppoſed taken none, or at leaſt inſufficient ſureties; and being (as it was ſworn) attorney for the plaintiff in this action. On ſhewing cauſe, *Garmeſon* made an affidavit of his illneſs and inability to do any buſineſs. The under-ſheriff and county court clerk ſhewed for cauſe, that they were intirely ignorant of this matter, having nothing to do with the replevin clerk, who was appointed by the high ſheriff in purſuance of the ſtatute. The court inlarged the rule to a further day, and ordered the high ſheriff to be added, when it was held, that as well * the high ſheriff and under- *494

under-ſheriff as the replevin clerk (who is their deputy) are anſwerable to the defendant in replevin for the ſufficiency of the pledges. They therefore diſcharged the rule againſt the county court clerk; but with regard to the high and under ſheriff, and the replevin clerk, they made the rule abſolute. Black. Rep. 1220.

To the avowant or perſon making conuſance] *Avowry* is, where one takes a diſtreſs, and the perſon diſtrained ſues a replevin; then he that took the diſtreſs muſt *avow* and juſtify in his plea, for what cauſe he took it, if he took it in his own right; and this is called an *avowry*: if he took it in the right of another, then, when he hath ſhewed the cauſe, he muſt make *conuſance* of the taking, as bailiff or ſervant to him, in whoſe right he took it. Terms of the L.

X. *Sale of the diſtreſs.*

Sale. Diſtreſs taken for an offence preſented in the leet, may of common right be ſold, becauſe it is a court of record; but otherwiſe it is, of diſtreſſes in courts that are not of record. 12 Mod. 330.

So a diſtreſs for an amercement in a court baron cannot be ſold; but in ſuch caſe a diſtreſs infinite ſhall go. 1 Bulſt. 52, 53.

In like manner, before the ſtatute of the 2 W. ſeſſ. 1. c. 5. diſtreſs for rent in arrear could not be ſold, but only detained till payment of the rent: But by the ſaid ſtatute it is enacted, that *whereas the moſt ordinary and ready way for recovery of arrears of rent is by diſtreſs, yet ſuch diſtreſſes not being to be ſold, but only detained as pledges for enforcing the payment of ſuch rent, the perſons diſtraining have little benefit thereby: therefore from henceforth, where any goods ſhall be diſtrained* (I) *for rent reſerved and due upon any demiſe, leaſe or contract whatſoever, and the tenant, or owner of the goods diſtrained, ſhall not within five days next after ſuch diſtreſs taken, and notice* (K) *thereof (with the cauſe of ſuch taking) left at the chief manſion houſe, or other moſt notorious place on the premiſſes, replevy the ſame; in ſuch caſe the perſon diſtraining ſhall, with the ſheriff or under-ſheriff of the county, or with the conſtable of the hundred, pariſh, or place, where ſuch diſtreſs ſhall be taken, cauſe the goods and chattels ſo diſtrained to be appraiſed by two ſworn* (L) *appraiſers (whom ſuch ſheriff, under-ſheriff, or conſtable ſhall ſwear) to appraiſe* (M) *the ſame truly, according to the beſt of their underſtanding; and* *495 *after * ſuch appraiſement, ſhall ſell the ſame for the beſt price can be gotten for them, for ſatisfaction of the rent, and charges of the diſtreſs, appraiſement and ſale; leaving the overplus (if any) with the ſheriff, under-ſheriff, or conſtable, for the owner's uſe.* 2 W. ſeſſ. 1. c. 5. ſ. 2.

Shall not within five days] M. 13 G. *Griffin* and *Scott*. Treſpaſs for entering his houſe, and keeping poſſeſſion of his goods eight days. The defendant juſtifies under a diſtreſs or rent. But by the court:

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The defendant ought to have removed the goods at the five days end; and for the other three he is a treſpaſſer, and there is no juſtification. Str. 717.

The conſtable of the hundred, pariſh, or place, where ſuch diſtreſs ſhall be taken.] T. 7 W. *Walter* and *Rumbald.* The tenement whereupon the diſtreſs was made, lay part in the hundred of *Kinaſley* in *Wiltſhire*, and part in the hundred of *Andover* in the county of *Southampton*; and part of the diſtreſs was taken in *Kinaſley*, and part in *Andover*; and all impounded together in the hundred of *Kinaſley*; and the conſtable of *Kinaſley* adminiſtered the oath to the appraiſers for the whole, in the preſence of the conſtable of *Andover*. It was objected, that the goods which were taken in *Andover* ought to have been impounded, appraiſed, and ſold in *Andover*; and that the conſtable of *Andover*, tho' preſent in *Kinaſley* when the appraiſement was made, had no juriſdiction there, ſo that the whole was done ſolely by the conſtable of *Kinaſley*, which therefore as to the goods taken in *Andover* was void. But by the court; the chaſing the diſtreſs over into the other county, is a continuance of the taking the diſtreſs; and the party, ſince it was for one intire cauſe, cannot ſever the diſtreſs, but ought to chaſe them all together, and impound them in one pound. L. Raym. 53.

By the 1 & 2 P. & M. c. 12. No perſon ſhall take for keeping in pound, or impounding any diſtreſs, above 4d for any one whole diſtreſs: and where leſs hath been uſed, there to take leſs; on pain of 5l to the party grieved, beſides what he ſhall take above 4d. ſ. 2.

XI. Irregularity in the proceedings.

Irregularity.

Where any diſtreſs ſhall be made, for any kind of rent juſtly due, and any irregularity ſhall be afterwards done by the party diſtraining, or his agent; the diſtreſs ſhall not be deemed unlawful, nor the diſtrainer a treſpaſſer *ab* * *initio*, but the party aggrieved may recover ſatisfaction for the ſpecial damage, in an action of treſpaſs or on the caſe; and if he recover, he ſhall have full coſts. 11 G. 2. c. 19. ſ. 19. *496

But no tenant ſhall recover on ſuch action, if tender of amends hath been made before the action brought. ſ. 20.

XII. Landlord re-entering on nonpayment.

Re-entring.

In caſe where a half year's rent ſhall be in arrear, and the landlord or leſſor hath right by law to re-enter for nonpayment thereof; he may, without any formal demand or re-entry, ſerve a declaration in ejectment; and on recovering judgment and execution, ſhall hold the premiſſes diſcharged from

from the leaſe. But this not to bar the right of any mortgagee. And if the defendant files a bill in equity, he ſhall not have an injunction againſt the proceedings at law, unleſs he ſhall bring the arrears into court, and alſo the coſts taxed in the ſaid ſuit. Provided, that if the tenant ſhall before the trial in ejectment, pay all the arrears and coſts, the proceedings on the ejectment ſhall thenceforth ceaſe. 4 G. 2. c. 28. ſ. 2, 3, 4.

XIII. Caſe of tenant holding over.

Holding over after the term expired.

1. By the 8 Ann. c. 14. Whereas tenants *pur autre vie* (that is, holding during the life of another perſon), and leſſees for years, or at will, frequently hold over after the determination of the leaſe; and whereas after the determination of ſuch, or any other leaſes, no diſtreſs can be made for arrears of rent that grew due on ſuch leaſes before the determination thereof; it is therefore enacted, that it ſhall be lawful to diſtrain after the determination of ſuch leaſe, in the ſame manner as if it had not been determined: provided, that the diſtreſs be made within ſix kalendar months after the determination of the leaſe, and during the continuance of the landlord's title or intereſt, and during the poſſeſſion of the tenant from whom ſuch arrear became due. ſ. 6, 7.

And by the 4 G. 2. c. 28. If any tenant for life or years, or other perſon who ſhall come into poſſeſſion by, from, or under him, ſhall wilfully hold over any lands, after the determination of ſuch term, and after demand made, and notice in writing given for delivering the poſſeſſion thereof; he ſhall, for the time that he ſhall ſo hold over,
*497 pay * double the yearly value thereof, to be recovered by action of debt, in any court of record. ſ. 1.

After the determination of ſuch term, and after demand made, and notice in writing given] E. 16 G. 3. *Cutting* and *Derby*. On an action for double value of the farm, it appeared, that the plaintiff on the 30th of September, and again on the 7th of October, gave a written notice to the defendant to quit the premiſſes on the 10th of October then following, being the day on which the leaſe would expire. It was objected, that by the ſtatute the notice ought to be *after* and not *before* the expiration of the term. But by the court, notwithſtanding the order in which the words are placed in the act of parliament, it is evident that the notice ought to be previous; otherwiſe it would be abſurd, and impoſſible to be complied with, to require *after* the expiration of the term that the tenant ſhould quit *at* the expiration. This ſtatute, and the 11 G. 2. c. 19. being in *pari materia* ought to have the ſame conſtruction; and where, by the latter the tenant is to be bound by his own notice to quit, that muſt be clearly previous. Black. Rep. 1075.

E. 6 G. 3. *Taſker* and *Burr*. The landlord demiſed to the tenant from year to year, commencing the 10th of October, being old Michaelmas-day. The tenant dies on the 27th of Auguſt. The landlord, on the 9th of September, gives notice to the executor to quit, at the end of the term. The queſtion was, If this notice is ſufficient? The court held clearly, that in a common caſe, it would not be ſufficient notice; but in the caſe of an executor, they doubted. But lord *Mansfield* inclined ſtrongly, that the nature of the contract being to hold from year to year, unleſs reaſonable notice was given on either ſide, and notice not having been given in reaſonable time; the executor was bound to keep the farm, if required, another year: And therefore on the other hand, is at liberty to keep it if he chuſes it. Black. Rep. 596.

M. 19 G. 3. *Dagget* and *Snowden*. In the common pleas. On the 5th of October 1769, a written memorandum was entered into, whereby the plaintiff agreed to let to the defendant a farm, to hold the arable ground from old Candlemaſs then next, the paſture from old Lady-day, and the meadow from old May-day, for ſeven years from the ſaid days and times, paying rent half yearly, at old Michaelmaſs and Lady-day. In September 1777, the plaintiff gave the defendant a written notice, to quit the arable land at old Candlemaſs next, the paſture at old Lady-day, and the meadow ground at old May-day. The * queſtion was, whether this notice was ſufficient to entitle the plaintiff to recover the whole or any part of the premiſſes? For the defendant it was argued, that this was not a ſufficient notice for any part; the whole being one intire tenancy; and therefore notice to quit ought to have been given on the 13th of Auguſt, being ſix months previous to the time when the firſt part of the term expired. But by the court, The notice was ſufficient for the whole. It was ſettled by all the judges about ten years ago, to avoid diverſity of opinions, and for general convenience, that in tenancies from year to year (which theſe kinds of holding over are held to be) there muſt be ſix months notice on either ſide to quit, according to the ancient law; except where any ſpecial agreement, or the cuſtom of any particular places, intervenes. The true conſtruction of this agreement is, that it is a holding from Lady-day to Lady-day, the rent being payable at Michaelmaſs and Lady-day. And though part of the farm is to be entred upon and quitted at old Candlemaſs, and other part not till old May-day, yet that is no more than the cuſtom of moſt countries would have directed, without any ſpecial words for that purpoſe, in a taking from old Lady-day. Black. Rep. 1224. *498

But after all, this remedy by action ſeemeth not altogether adequate to the evil; for three reaſons. 1. Becauſe ſuch action is certainly tedious and expenſive. 2. It is uncertain, when the action is over, whether the tenant will be able to pay. 3. What is chiefly wanted, namely, putting the landlord into poſſeſſion, is not obtained by ſuch action, but for that he ſhall be ſtill to ſeek. A more ſhort and eaſy method of ouſting the tenant of his poſſeſſion, ſeemeth more eligible in the like caſes.

7. Whereas

Holding over after having given notice to quit.

2. Whereas great inconveniencies have happened to landlords, whoſe tenants have power to determine their leaſes, by giving notice to quit the premiſſes, and yet refuſing to deliver up the poſſeſſion, when the landlord hath agreed with another tenant for the ſame; it is therefore enacted, that if any tenant ſhall give notice of his intention to quit the premiſſes at a time mentioned in ſuch notice, and ſhall not accordingly deliver up the poſſeſſion at the time in ſuch notice contained, he, his executors or adminiſtrators, ſhall from thence forward pay double rent, to be recovered in like manner as the ſingle rent. 11 G. 2. c. 19. ſ. 18.

H. 5 G. 3. *Timmins* and *Rowliſon*. In replevin, the landlord avows, that he demiſed the premiſſes to the tenant for one year from
*499 the 5th of April 1760; that the tenant * gave notice that he would quit the 5th of April 1761, but held over till the 10th of October; wherefore he avows for double rent for half a year. The tenant pleads a demiſe, from the landlord for one year from the 5th of April 1760, and ſo from year to year, as long as both parties pleaſed: That the demiſe was only by parol; and that the notice proved to be given by the tenant to the landlord to quit the 5th of April 1761, was only by parol likewiſe. The queſtion was, Whether the tenant was liable to pay double rent for not quitting after a parol notice; and further, as he held under a parol demiſe, as tenant from year to year, whether this is a holding under the ſtatute, ſo as to ſubject the tenant to double rent for not quitting after notice.——It was argued for the tenant, that the act muſt be confined to leaſes, wherein an expreſs power is reſerved to determine the tenure by notice; and to notices in writing only; becauſe the ſtatute ſpeaks of the time in ſuch notice *mentioned* and *contained*, which words are not applicable to parol notices.——For the landlord it was inſiſted, that this being a remedial law, the words might be fairly extended to parol leaſes, which are the moſt common, and to parol notices; without which, the clauſe would be nugatory, and affect only ſuch tenants as were fooliſh enough, to give written inſtead of parol notices.——By lord *Manſfield* chief juſtice: Statutes *in pari materia* are to be taken all as one ſyſtem, to ſuppreſs the miſchief. The miſchief is an act of vexation, inconvenience, and injuſtice, by the tenant, after notice given by himſelf, after the landlord has another tenant ready, to ſtop ſhort and ſay, I won't quit. This is an univerſal ſort of holding, and therefore this practice might be a very extenſive evil. The legiſlature, in the 4 G. 2. made a proviſion, where the landlord gives notice, and afterwards in the 11 G. 2. this additional proviſion, in caſe the notice comes from the tenant. The two laws are only parts of the ſame proviſion. It is ſaid, the notice muſt be in writing. Why? Does the act ſay ſo? No. But the act of 4 G. 2. does. That is the ſtrongeſt reaſon againſt it. It is here purpoſely omitted. The drawer of the act could not leave it out by accident, having the other act before him. As to the words *mentioned* and contained; may not that be in a parol notice? Certainly it may. I therefore think this is a caſe within

within the miſchief, the preamble, and the enacting words of the ſtatute.——*Wilmot* juſtice (the other two juſtices being abſent): As to the notice being in writing, the different penning of the acts furniſhes evidence of different intentions. The 4 G. 2. ſeems to reſpect chiefly * leaſes for lives or for long terms of years; and if the tenant holds * 500
over, and the landlord gives notice in writing for him to quit, he ſhall recover not double rent (for that might not be an equivalent) but double the yearly value of the eſtate: And for that reaſon it was neceſſary, that it ſhould be recovered by action, and not by diſtreſs. There are two good reaſons why one ſhould be in writing, and the other not. Firſt, if the tenant gives ſuch notice as will juſtify his leaving the farm, and doth not leave it, that is the miſchief which the act meant to meet; and parol notice is ſufficient for that. Secondly, landlords generally can write: tenants in the country very ſeldom can. This caſe is within the preamble and the enacting words; but, had the preamble been confined, I ſhould have been for extending the remedy according to the enacting words. Theſe tenancies are the moſt uſual of any. It hath almoſt extinguiſhed tenancy at will, which by reaſon of the inconveniencies that would otherwiſe enſue to both parties, is not now to be underſtood as determinable at pleaſure, but for a year certain, which was better, but ſtill inconvenient; to turn out or quit at the end of the year, without notice. This produced the preſent rule, that landlords and tenants ſhall mutually give reaſonable notice. What is reaſonable, is matter of circumſtances. This brings the preſent leaſe within the words of the act. They have power to quit and determine, upon giving reaſonable notice.——And judgment was given for the landlord. Black. Rep. 533. Bur. Manſf. 1603.

But this remedy, in like manner as the former, ſeemeth not appoſite to the main purpoſe. The ſtatute proceeds upon a ſuppoſition that the tenant is a man of ſubſtance: Which probably may not be the caſe. It is moſt likely, that if he were able to live elſewhere, he would not chuſe to hold over under ſuch circumſtances, nor perhaps would the landlord want to be rid of him. The putting him out of poſſeſſion, by ſome expeditious and eaſy method, ſeemeth the more adequate remedy in this caſe alſo, in like manner as is provided in the caſe where the tenant deſerteth the premiſſes, as hereafter followeth.

XIV. Attorning to ſtrangers.

Attorning to ſtrangers.

Whereas the poſſeſſion of eſtates is rendered precarious, by tenants attorning to ſtrangers; it is enacted, that all ſuch attornment ſhall be void; unleſs the ſame be made purſuant to ſome judgment at law or decree in equity, or * be with the conſent of the landlord, or be to a mortgagee after the mortgage is become forfeited. 11 G. 2. c. 19. ſ. 11. * 501

And tenants to whom any declaration in ejectment ſhall be delivered, ſhall forthwith give notice thereof to the landlord; on pain of forfeiting to him three years value of the rent; and the landlord may make himſelf defendant by joining with the tenant, or may appear by himſelf. ſ. 12, 13.

And if the tenant ſhall not give notice to the landlord, and the plaintiff ſhall obtain judgment againſt him by default; the court, on application, will ſet aſide the judgment, and order the tenant to pay the coſts. Bur. Mansf. 1996.

XV. *Deſerting the premiſſes.*

Tenant deſerting. If any tenant at rack rent, or where the rent reſerved ſhall be full three fourths of the yearly value of the demiſed premiſſes, who ſhall be in arrear for one year's rent, ſhall deſert the premiſſes, and leave the ſame uncultivated or unoccupied, ſo as no ſufficient diſtreſs can be had; two juſtices (having no intereſt in the premiſſes) may, at the requeſt of the landlord, go upon and view the ſame, and affix on the moſt notorious part of the premiſſes, notice in writing, what day (at the diſtance of 14 days at the leaſt) they will return to take a ſecond view: and if on ſuch ſecond view, the tenant ſhall not appear and pay the rent, or there ſhall not be ſufficient diſtreſs on the premiſſes, then the juſtices may put the landlord into poſſeſſion, and the leaſe as to ſuch demiſe ſhall from thence be void. 11 G. 2. c. 19. ſ. 16.

But the tenant may appeal to the next juſtice or juſtices of aſſize; who may award coſts to either party. ſ. 17.

XVI. *Rent in caſe of an extent or execution.*

Extent or execution. In the caſe of *K.* and *Cotton*, T. 1755, it was determined by the barons of the exchequer, and affirmed on a writ of error, that if a diſtreſs be made for rent, and before the five days given by act of parliament are expired an extent is iſſued, though it be not levied, for a debt due to the crown; the extent ſhall take place of the diſtreſs: becauſe the diſtreſs doth not ouſt the property of the effects into the landlord, but is only a pledge for ſecurity in his hands for his rent.

*502 * But by the 8 An. c. 14. No goods being on any meſſuage, lands, or tenements, leaſed for life, term of years, at will, or otherwiſe, ſhall be liable to be taken by execution, unleſs the party, at whoſe ſuit the execution is ſued out, ſhall, before the removal of ſuch goods from off the premiſſes, pay to the landlord or his

his bailiff all ſuch rent as ſhall be then due for the premiſſes, provided that it amount not to more than one year's rent; and if the ſaid arrears ſhall exceed one year's rent, then the party paying ſuch landlord one year's rent, may proceed to execute his judgment. 1 L.

And in caſe of two executions, there ſhall not be two years rent paid to the landlord: for the intent of the act was to reſerve to the landlord only the rent for one year, and it was his own fault if he let more run in arrear. Therefore one year's rent to the landlord being paid to him on the firſt execution, the ſheriff is not to levy for him again any thing on a ſubſequent execution. Str. 1024.

XVII. Rent on the death of tenant for life.

Tenant for life dying.

Whereas where any leſſor or landlord, having only an eſtate for life, in the lands, tenements, or hereditaments demiſed, happens to die before or on the day on which any rent is reſerved or made payable, ſuch rent or any part thereof is not by law recoverable by the executors or adminiſtrators of ſuch leſſor or landlord; nor is the perſon in reverſion intitled thereto, other than for the uſe and occupation from the death of the tenant for life; of which, advantage hath often been taken by the undertenants, who thereby avoid paying any thing for the ſame: for remedy thereof, where any tenant for life ſhall happen to die before or on the day on which any rent was reſerved or made payable, upon any demiſe or leaſe of any lands, tenements, or hereditaments, which determine on the death of ſuch tenant for life, the executors or adminiſtrators of ſuch tenant for life may, in an action on the caſe, recover of ſuch under-tenant, if ſuch tenant for life die on the day on which the ſame was made payable, the whole, or if before ſuch day then a proportion, of ſuch rent, according to the time ſuch tenant for life lived, of the laſt year, or quarter of a year, or other time in which the ſaid rent was growing due. 11 G. 2. c. 19. ſ. 15.

In the caſe of *Pagett* and *Gee*, Dec. 4, 1753. Tenant in tail, remainder to the defendant in fee, leaſes for years, * and dies without iſſue a week before the day of payment of the half year's rent. The leſſee, at the day, pays all the half year's rent to the defendant. The executor of the tenant in tail brings his bill for apportionment of the rent.——By the lord chancellor *Hardwicke*: This point has never been determined; but this is ſo ſtrong a caſe, that I ſhall make it a precedent. There are in it two grounds for relief in equity. The firſt ariſes on the ſtatute of the 11 G. 2. The ſecond ariſes on the tenant's having ſubmitted to pay the rent to the defendant.—The relief ariſing upon the ſtatute, is, either from the ſtrict legal conſtruction, or equity formed upon the reaſon of it. And here it is proper to conſider, what the miſchief was before the act, and what *503

remedy is provided at common law. If tenant for life, or any who had a determinable eſtate, died but a day before the rent reſerved on a leaſe of his became due, the rent was loſt. For no one was intitled to recover it. His repreſentatives could not; becauſe they could only bring an action for the uſe and occupation; and that could not lie where there was a leaſe, but debt or covenant. Nor could the remainder-man; becauſe it did not accrue in his time. Now this act appoints the apportioning the rent, and gives the remedy. But there are two deſcriptions of the perſon, to whoſe executors the remedy is given. In the preamble, it is one having only an eſtate for life. In the enacting part, it is, tenant for life. Now tenant in tail comes expreſsly within the miſchief. I do not know how the judges at common law would conſtrue it; but I ſhould be inclined in this court to extend it to them. I ſhould make no doubt, were this the caſe of tenant in tail after poſſibility of iſſue extinct; for he is conſidered in many reſpects as tenant for life only. He cannot ſuffer a recovery. He may be injoined from committing waſte, ſuch as hurts the inheritance, as felling timber; though not for committing common waſte, being conſidered as to that as tenant in tail. Were it the caſe of tenant for years determinable on lives, he certainly muſt be included within the act, though it ſays only tenant for life: It would be playing with the words to ſay otherwiſe. Theſe caſes ſhew the neceſſity of conſtruing this act beyond the words. Tenant in tail has certainly a larger eſtate than a mere tenant for life; for he has the inheritance in him, and may when he pleaſes turn it into a fee; but if he does not; at the inſtant of his death he has but an intereſt for life. Such too is the caſe of a wife tenant in tail *ex proviſione mariti*. Upon this point I give no abſolute opinion. As * to the equity
*504 ariſing from this ſtatute, I know no better rule than this, *equitas ſequitur legem*. Where equity finds a rule of law agreeable to conſcience, it purſues the ſenſe of it to analogous caſes. If it does ſo as to maxims of the common law, why not as to the reaſons of acts of parliament? Nay, it has actually done ſo, on the ſtatute of forcible entry; upon which this court grounds bills, not only to remove the force, but to quiet the poſſeſſion. That act requires a legal eſtate in poſſeſſion. This court extends the reaſon to equitable intereſt.—— But I ground my opinion in this caſe upon the tenant's having ſubmitted to pay the rent. He has held himſelf bound in conſcience to pay it, for the uſe and occupation of the land the laſt half year. He paid it to the defendant, which he was not bound to do in law. And in ſuch a caſe, the perſon he pays it to ſhall be accountable, and conſidered as receiving it for thoſe who are in equity intitled to it. The diviſion muſt be that preſcribed by the ſtatute; and then the plaintiff is intitled to ſuch a proportion of the rent as accrued during the teſtator's life.——And accordingly it was decreed. M. S.

XVIII. *Rent how far recoverable by executors or administrators.*

Rent recoverable by executors or administrators.

By the 32 H. 8. c. 37. Forasmuch as by the order of the common law, the executors or administrators of tenants in fee simple, fee tail, and for term of life, of rents services, rent charges, rent secks, and fee farms, have no remedy to recover such arrearages of the said rents or fee farms as were due to their testators in their lives, and yet the heirs of such testator, nor any person having the reversion of his estate after his decease, may distrain or have action to levy the same, it is enacted, that the executors and administrators of every such person to whom any such rent or fee farm shall be due and not paid at the time of his death, may have an action of debt for the same, against the tenant who ought to have paid the same, or against his executors and administrators; or may distrain upon the premisses, so long as they continue in the possession of such tenant in demesne, who ought immediately to have paid the same to the testator in his life, or of any other person claiming the same only by and from such tenant by purchase, gift, or descent. s. 1.

In like manner the husband may have action, or distrain for arrears due in the lifetime and in the right of his wife. s. 3.

* And if any person shall have any rents or fee farms for the life of any other person, which shall be behind and unpaid at the death of such other person; he, his executors or administrators, may have action of debt against the tenant in demesne that ought to have paid the same when it was first due, his executors and administrators, or may distrain for the same upon the premisses, in such like manner as he might have done if the person by whose death the estate was determined had been in full life. s. 4. * 505

Note, *fee farm* is, when the lord, upon the creation of the tenancy, reserves to himself and his heirs, either the rent for which it was before let to farm, or at least a fourth part of the value; without homage, fealty, or other services, beyond what are especially comprised in the feoffment; and it is called a fee farm rent, because a farm rent is reserved upon a grant in fee. 2 Inst. 44.

XIX. Of

XIX. *Of diſtreſs by warrant of juſtices of the peace.*

By the 27 G. c. 20. It is enacted as follows: *In all caſes where any juſtice of the peace is or ſhall be required or impowered by any act of parliament, to iſſue a warrant of diſtreſs, for the levying of any penalty inflicted, or any ſum of money directed to be paid by ſuch act; it ſhall be lawful for the juſtice granting ſuch warrant, therein to order and direct the goods and chattels ſo to be diſtrained, to be ſold and diſpoſed of within a certain time to be limited in ſuch warrant, ſo as ſuch time be not leſs than four days nor more than eight days, unleſs the penalty or ſum of money for which ſuch diſtreſs ſhall be made, together with the reaſonable charges of taking and keeping ſuch diſtreſs, be ſooner paid.*

And the officer making ſuch diſtreſs, ſhall and may deduct the reaſonable charges of taking, keeping, and ſelling ſuch diſtreſs, out of the money ariſing by ſuch ſale; and the overplus (if any) after ſuch charges, and alſo the ſaid penalty or ſum of money, ſhall be ſatisfied and paid, ſhall be returned on demand, to the owner of the goods ſo diſtrained: and the officer executing ſuch warrant, if required, ſhall ſhew the ſame to the perſon whoſe goods are diſtrained, and ſhall ſuffer a copy thereof to be taken.

But this ſhall not extend, to alter any proviſions relating to diſtreſſes to be made for the payment of tithes and church rates by the people called quakers, contained in the acts of the 7 & 8 *W. c.* 34. *and the* 1 *G. ſt.* 2. *c.* 6.

*506 * *Order and direct the goods to be ſold.*] And in this caſe no replevy lies: the ſheriff having no power to examine the proceedings of the juſtices. 1 Barnardiſt. 110. Str. 1184.

Officer may deduct the reaſonable charges.] But here is no power given to the juſtices to aſcertain ſuch charges; therefore it ſeemeth, that the officer executing the warrant ſhall be the ſole judge thereof in the firſt inſtance, and afterwards, if the owner of the goods diſtrained ſhall be diſſatisfied, the reaſonableneſs thereof ſhall be determined by a judge and jury upon an action brought.

But by ſpecial ſtatutes, this power of aſcertaining the charges of diſtreſs and ſale is ſometimes given to the juſtices, as is ſet forth in this book under the reſpective titles.

Tithes and church rates by the people called quakers.] The abovesaid ſtatutes of the 7 & 8 W. c. 34. and 1 G. ſt. 2. c 6. relate not only to *tithes and church rates* (by which laſt ſeemeth only to be underſtood the churchwardens rate for the repair and other uſes of the church), but alſo to any cuſtomary or other rights, dues, or payments, belonging

longing to any church or chapel, which of right by law and cuſtom ought to be paid for the ſtipend or maintenance of any miniſter or curate officiating in any church or chapel. Therefore, for any thing that appears from the words of this ſtatute, unleſs it be in the caſe of *tithes* or *church rates*, the juſtices may order the diſtreſs for thoſe other dues and payments to be detained for a certain time, and the officer may deduct the charges not only of *diſtraining*, but alſo of *keeping* and *ſelling* the diſtreſs; whereas by thoſe former acts above mentioned, the officer was only allowed to deduct the neceſſary charges of *diſtraining*.

The eight precedents next following, drawn and communicated to the author by a gentleman of great learning and judgment, acting in the commiſſion of the peace *, are inſerted, not only as uſeful in this place, but as patterns for our imitation in other like caſes.

*A. *Complaint to be exhibited in writing before two juſtices, in the caſe of goods clandeſtinely removed; on the* 11 *G.* 2. *c.* 19. *507

Weſtmorland. BE it remembered, that this —— day of —— *A. I.* of —— complaineth, that *A. O.* of —— hath fraudulently and clandeſtinely, removed and conveyed away certain goods and chattels of ———— not exceeding the value of 5ol, from ———— at ———— to prevent ———— from diſtraining the ſaid goods and chattels for arrears of rent due to the ſaid ———— for the ſaid ———— And that *B. O.* of ———— yeoman, and *C. O.* of ———— yeoman, wilfully and knowingly aided and aſſiſted the ſaid *A. O.* in ſo fraudulently and clandeſtinely removing and conveying away the ſaid goods and chattels, and in concealing the ſame.

A. I.

Exhibited at —— the —— day of ——
before us ———— juſtices of the peace of
—— reſiding near —— not being intereſted in ——.

* The late Sir *Thomas Drury*, Baronet.

B. *Warrant*

B. *Warrant thereupon to ſummon the parties concerned.*

Weſtmorland. { *To the conſtable of*

WHEREAS a complaint in writing hath been this ——— day of ——— exhibitted before us ——— juſtices of the peace ——— reſiding near ——— not being intereſted in ——— by *A. I.* of ——— gentleman, ſetting forth that *A. O.* of ——— yeoman, hath fraudulently and clandeſtinely removed and conveyed away certain goods and chattels of ——— not exceeding the value of 5ol, from ——— to prevent ——— from diſtraining the ſaid goods and chattels, for arrears of rent due to the ſaid ——— for the ſaid ——— And that *B. O.* of ——— yeoman, and *C. O.* of ——— yeoman, wilfully and knowingly aided and aſſiſted the ſaid ——— in ſo fraudulently and clandeſtinely removing and conveying away the ſaid goods and chattels, and in concealing the ſame: Theſe are therefore to command you forthwith to ſummon the ſaid *A. O. B. O.* and *C. O.* to appear before us
*508 at ——— on the ——— * day of ——— at the hour of ——— to anſwer the matter of the ſaid complaint. Given under our hands and ſeals at ——— the ———day of ———

C. *Order of two juſtices thereupon.*

Weſtmorland. { *The order and adjudication of ——— and ——— juſtices of the peace of* ———

WHEREAS *A. O.* of ——— yeoman, hath been duly charged before us ——— and ——— juſtices of the peace of ——— reſiding near ——— not being intereſted in ——— with having fraudulently and clandeſtinely removed and conveyed away certain goods and chattels of ——— not exceeding the value of 5ol. from ——— to prevent the ſaid ——— from diſtraining the ſaid goods and chattels, for arrears of rent due to the ſaid ——— for the ſaid ———; And whereas *B. O.* of ——— yeoman, and *C. O.* of ——— yeoman, have been alſo duly charged before us, with having wilfully and knowingly aided and aſſiſted the ſaid ——— in ſo fraudulently and clandeſtinely removing and conveying away the ſaid goods

goods and chattels, and in concealing the ſame; And we the ſaid juſtices having ſummoned the parties concerned, and examined the fact, and all proper witneſſes upon oath [*or in caſe of a quaker*, upon affirmation required by law] And it appearing and being fully proved before us, that the ſaid *A. O.* did ſo fraudulently and clandeſtinely remove and convey away, as aforeſaid, —— being of the value of —— and the goods and chattels of the ſaid ——; And it alſo appearing and being fully proved before us, that the ſaid *B. O.* and *C. O.* wilfully and knowingly aided and aſſiſted the ſaid *A. O.* in ſo removing and conveying away as aforeſaid, the ſaid —— and in concealing the ſame: We the ſaid juſtices do therefore this —— day of —— determine and adjudge that the ſaid *A. O. B. O.* and *C. O.* are guilty of the offences, with which they the ſaid *A. O. B. O.* and *C. O.* are charged as aforeſaid, and they are convicted thereof; and we do hereby order and adjudge them the ſaid *A. O. B. O.* and *C. O.* to pay the ſum of —— being double the value of the ſaid goods and chattels, to —— or to his bailiff, ſervant or agent, on or before the —— day of ——. Given under our hands and ſeals at —— the —— day of ——.

* D. *Warrant of diſtreſs, in caſe the offenders having notice, refuſe or neglect to pay, purſuant to the preceding order.* 11 G. 2. *c.* 19. 27 G. 2. *c.* 20. * 509

Weſtmorland. { *To the conſtable of* ——.

WHEREAS *A. O.* of —— yeoman, *B. O.* of —— yeoman, and *C. O.* of —— yeoman, were by an order dated the —— day of —— under the hands and ſeals of us —— and —— juſtices of the peace of —— reſiding near —— not being intereſted in —— ordered to pay the ſum of —— to —— or his bailiff, ſervant, or agent, on or before the —— day of —— being double the value of certain goods and chattels of the ſaid —— which the ſaid *A. O.* was before us duly convicted of having fraudulently and clandeſtinely removed and conveyed away from —— to prevent the ſaid —— from diſtraining the ſaid goods and chattels for arrears of rent due to the ſaid —— for the ſaid —— and which the ſaid *B. O.* and *C. O.* were alſo duly convicted before us, of having wilfully and knowingly aided and aſſiſted the ſaid *A. O.* in ſo fraudulently and clandeſtinely removing and conveying away, and in concealing the ſame; And whereas the ſaid *A. O. B. O.* and *C. O.* having notice of our ſaid order, have

have refuſed or neglected to pay, and have not paid, the ſaid ſum of ——— purſuant thereunto, and the ſame hath been fully proved before us; Theſe are therefore to command you to levy the ſaid ſum of ——— by diſtreſs and ſale of the goods and chattels of the ſaid *A. O. B. O.* and *C. O.* and we do hereby order and direct the goods and chattels ſo to be diſtrained, to be ſold and diſpoſed of, within ——— days, unleſs the ſaid ſum of ——— for which ſuch diſtreſs ſhall be made, together with the reaſonable charges of taking and keeping ſuch diſtreſs, ſhall be ſooner paid: And you are alſo hereby commanded to certify to us what you ſhall do by virtue of this our warrant. Given under our hands and ſeals at ——— the ——— day of ———.

E. *The conſtable's return thereupon of the want of diſtreſs.*

Weſtmorland. I *A. C.* conſtable of ——— do hereby certify ——— and ——— juſtices of the peace of ——— that I have made diligent ſearch for, but do not know of, nor can find, any goods and chattels of ——— and ——— and ——— or of any of
* 510 them, by diſtreſs and ſale whereof I * may levy the ſum of ——— purſuant to their warrant for that purpoſe, dated the ——— day of ———. Given under my hand this ——— day of ———.

F. *Commitment thereupon to the houſe of correction.*

Weſtmorland. { *To the conſtable of ——— and alſo to the keeper of the houſe of correction at ———.*

WHEREAS ——— and ——— and ——— were by an order dated the ——— day of ——— under the hands and ſeals of us ——— juſtices of the peace of ——— reſiding near ——— not being intereſted in ——— ordered to pay the ſum of ——— to ——— or to his bailiff, ſervant, or agent, on or before the ——— day of ——— being double the value of certain goods and chattels of the ſaid ——— which the ſaid ——— was before us duly convicted of having fraudulently and clandeſtinely removed and conveyed away from ——— to prevent the ſaid ——— from diſtraining the ſaid goods and chattels, for arrears of rent due to the ſaid ——— for the ſaid ——— And which the ſaid ——— and ——— were alſo duly

duly convicted before us of having wilfully and knowingly aided and aſſiſted the ſaid ——— in ſo fraudulently and clandeſtinely removing and conveying away, and in concealing the ſame; And whereas the ſaid ——— and ——— and ——— having notice of our ſaid order, have refuſed or neglected to pay, and have not paid, the ſaid ſum of ——— purſuant thereunto, and the ſame hath been duly proved before us; And whereas it appears to us, by the return of ——— conſtable of ——— dated the ——— day of ——— that he hath made diligent ſearch for, but doth not know of, nor can find, any goods and chattels of the ſaid ——— and ——— and ——— or any of them, by diſtreſs and ſale whereof the ſaid ſum of ——— may be levied, purſuant to our warrant duly made and iſſued for the levying the ſaid ſum of ——— by diſtreſs and ſale of the goods and chattels of the ſaid ——— and ——— and ———: Theſe are therefore to command you the ſaid conſtable of ——— to apprehend the ſaid ——— and ——— and ——— and convey them to the ſaid houſe of correction at ——— aforeſaid, and deliver them there to the ſaid keeper of the ſaid houſe of correction; and theſe are alſo to command you the ſaid keeper of the ſaid houſe of correction, to receive them the ſaid ——— and ——— and ——— into the ſaid houſe of correction, and there keep them to hard labour, without bail or mainprize, for the ſpace of ſix months, unleſs the ſaid ſum of * ——— ſo ordered to be paid as aforeſaid, ſhall be ſooner ſatisfied. *511
Given under our hands and ſeals at ——— the ——— day of ———.

G. *Form of a complaint and oath to be made before a juſtice, in caſe of a dwelling houſe, where goods and chattels are fraudulently and clandeſtinely removed and conveyed away and ſecured, ſo as to prevent them from being taken and ſeized as a diſtreſs for arrears of rent.*

Weſtmorland. BE it remembered, that, this ——— day of ——— *A. I.* of ——— yeoman, complaineth, and maketh oath, that certain goods and chattels of *A. O.* of ——— yeoman, have been fraudulently and clandeſtinely conveyed and carried away from ——— by the ſaid *A. O.* his ſervant or ſervants, agent or agents, or other perſon or perſons, aiding or aſſiſting therein, to prevent ——— from diſtraining the ſaid goods and chattels for arrears of rent due to the ſaid ——— for the ſaid ——— And that the ſaid goods and chattels are put, placed, or kept, in the houſe, barn, ſtable, outhouſe, yard, cloſe, or other place of ——— at ——— locked up, faſtened, or otherwiſe ſecured, ſo as to prevent the ſaid goods and chattels from being taken and ſeized as a

diſtreſs for arrears of rent; And that the ſaid *A. I.* hath a reaſonable ground to ſuſpect, and doth ſuſpect, that the ſaid goods and chattels are in the dwelling houſe of the ſaid ——— at ———.

A. I.

Taken and ſworn at ——— *the* ———
day of ——— *before* ———

H. *Warrant upon the preceding complaint and oath.*

Weſtmorland. { *To the conſtable, headborough, borſholder, or other peace officer of* ——— *and to each, and every of them.*

WHEREAS *A. I.* of ——— yeoman, hath this ——— day of ——— exhibited his complaint and made oath before ——— juſtices of the peace of ——— that certain goods and chattels of *A. O.* of ——— yeoman, have been fraudulently and clandeſtinely conveyed and carried away from ——— by the ſaid *A. O.* his ſervant or ſervants, agents or agents, or other perſon or perſons aiding or aſſiſting therein, to prevent ——— from diſtraining the ſaid goods and chattels for arrears of rent * due to the
*512 ſaid ——— for the ſaid ———; And that the ſaid goods and chattels are put, placed, or kept in the houſe, barn, ſtable, outhouſe, yard, cloſe, or other place of ——— at ——— locked up, faſtened, or otherwiſe ſecured, ſo as to prevent the ſaid goods and chattels from being taken and ſeized as a diſtreſs for arrears of rent; and that the ſaid *A. I.* hath a reaſonable ground to ſuſpect, and doth ſuſpect, that the ſaid goods and chattels are in the dwelling houſe of ——— at ———: Theſe are therefore to command you, and each and every of you, to aid and aſſiſt ——— his ſteward, bailiff, receiver, or other perſon or perſons impowered to take and ſeize as a diſtreſs for rent the ſaid good and chattels, in the day time to break open, and enter into the ſaid dwelling houſe, barn, ſtable, outhouſe, yard, cloſe, or other place of the ſaid ——— at ——— and to take and ſeize the ſaid goods and chattels for the ſaid arrears of rent, according to law. Given under my hand and ſeal at ——— the ——— day of ———.

I. *The*

I. *The form of the inventory of the goods diſtrained may be this.*

AN inventory of the ſeveral goods and chattels, diſtrained by us whoſe names are under written, the ——— day of ——— in the year ——— in the houſes, outhouſes, and lands, of *A. T.* in ——— by the authority and on the behalf of *A. L.* of ——— for ——— pounds arrear of rent due to him the ſaid *A. L.*

In the dwelling houſe;
One table,
Six chairs, &c.
In the cow houſe;
Six cows,
Two calves, &c.

K. *Notice.*

A. T.

TAKE notice, that by the authority and on the behalf of your landlord *A. L.* I have this ——— day of ——— in the year of our lord ——— diſtrained the ſeveral goods and chattels ſpecified in the ſchedule hereunto annexed, in your houſes, outhouſes, and ——— grounds, at ——— for ——— pounds arrear of rent due to him the ſaid *A. L.* And if you ſhall not pay the ſaid rent ſo due and in arrear as aforeſaid, or replevy the ſaid goods and chattels, I ſhall, after the expiration of five days from the * date hereof, cauſe the ſaid good and chattels to be appraiſed and ſold, according to the ſtatute in that caſe made and provided. Given under my hand the day and year firſt above written. * 513

A. D.

Witneſs that a copy hereof was this day delivered to the ſaid *A. T.* (*Or*, left at the chief manſion houſe of the ſaid *A. T.*)
A. W.

L. *Appraiſers*

L. *Appraiſers oath.*

YOU and each of you ſhall well and truly appraiſe the goods and chattels mentioned in this inventory, according to the beſt of your underſtanding. So help you God.

M. *Form of the appraiſement.*

THE appraiſement may be in the form of the inventory, ſpecifying the particulars, and their reſpective valuations: And then add at the end,

Appraiſed by us, this —— day of —— in the year ——

A. P. }
B. P. } ſworn Appraiſers.

Diſtringas. See *Proceſs.*

Divine Service. See *Publick Worſhip.*

DOGS.

So far as Dogs fall under the conſideration of the Game laws, See title Game.

Dogs miſchievous.

1. A Maſtiff, going in the ſtreet unmuzzled, from the ferocity of his nature being dangerous and cauſe of terror to his majeſty's ſubjects, ſeemeth to be a common nuſance, and conſequently the owner may be indicted for ſuffering him to go at large.

If a man has a dog that *kills ſheep*, this is not a publick nuſance, but the owner of the dog (knowing thereof) is liable to an action; but if he is ignorant of ſuch quality, he ſhall not be puniſhed for this killing: And in an action upon the caſe for ſuch killing, the plaintiff ſhall be required * to prove in evidence, that the dog had *514 uſed to kill ſheep. Dyer. 25. Het. 171.

And in order to maintain an action for *biting* by the defendant's dog, it muſt be proved alſo that he knew his dog to be uſed to bite; but one inſtance is ſufficient in that caſe. 12 Mod. 555.

And if a man keeps a dog accuſtomed to bite *ſheep*, and he knows it, and notwithſtanding he keeps the dog ſtill, and afterwards the dog bites an *horſe*; this ſhall be actionable, altho' he had been known before to bite ſheep only: becauſe the owner, after notice of the firſt miſchief, ought to have deſtroyed or hindered him from doing any more hurt. Ld. Raym. 110.

2. M. 17 G. 3. On an action of trover and converſion for a pointing dog, the plaintiff proved the dog to be his property, and that it was found at the defendant's houſe twelve months after it was loſt. The defendant ſaid, the dog ſtrayed there caſually, and demanded 20s for 20 weeks keeping, before he would deliver up the dog. A verdict was given for the plaintiff, ſubject to the opinion of the court, whether this refuſal amounted to a converſion of the dog. But the counſel for the defendant declined arguing the queſtion, and the plaintiff had judgment. Black. Rep. 1117. *Dog ſtraying.*

3. Stealing dogs is not felony; for however they may be valued by the owner, yet they ſhall never be ſo highly regarded by the law, that for the ſake of them a man ſhall die. 1 Haw. 93. *Stealing dogs.*

But by the 10 G. 3. c. 18. If any perſon ſhall ſteal any dog or dogs, of any kind or ſort whatſoever, from the owner thereof, or from any perſon intruſted by the owner therewith; or ſhall ſell, buy, or receive, harbour, detain, or keep any ſuch dog or dogs, knowing the ſame to have been ſtolen; every ſuch perſon ſhall, on conviction upon the oath of one witneſs, or his or her own confeſſion, before two juſtices, forfeit for the firſt offence any ſum not exceeding 30l, nor leſs than 20l. as to ſuch juſtices ſhall ſeem meet, together with the charges previous to and attending ſuch conviction, to be aſcertained by ſuch juſtice before whom the offender ſhall be convicted; and if not forthwith paid, the ſaid juſtice ſhall commit the offender to the common gaol or houſe of correction, for any time not exceeding 12 calendar months, nor leſs than ſix, or until the penalty and charges ſhall be paid; and if any perſon, having been convicted as aforeſaid, ſhall afterwards be guilty of the like offence, and ſhall be thereof convicted in like manner as aforeſaid, every ſuch perſon * ſhall forfeit not exceeding 50l, nor leſs than 30l, as to ſuch juſtices ſhall ſeem meet, together with the charges previous to and attending *515 ſuch conviction, to be aſcertained by ſuch juſtices before whom the offender

offender ſhall be convicted; which ſaid penalties, or any of them, when recovered, ſhall be paid half to the informer, and half to the poor; and upon nonpayment thereof, ſuch juſtices ſhall commit the offender to the common gaol or houſe of correction, for any time not exceeding 18 months, nor leſs than 12, or until the penalty and charges ſhall be paid; and ſuch juſtices ſhall alſo order the offender to be publickly whipped, within three days after ſuch commitment, in the town wherein ſuch gaol or houſe of correction ſhall be, between the hours of twelve and one of the clock. *ſ.* 1.

And one juſtice, on information to him made, may grant a warrant to ſearch for any dog ſtolen as aforeſaid; and in caſe any ſuch dog or the ſkin thereof ſhall upon ſuch ſearch be found, the ſaid juſtice ſhall take and reſtore ſuch dog or ſkin to the owner thereof; and the perſon in whoſe cuſtody or poſſeſſion ſuch dog or ſkin ſhall be ſo found (in caſe it ſhall appear that ſuch perſon was privy to ſuch dog having been ſtolen, or that ſuch ſkin was the ſkin of any ſuch dog ſtolen as aforeſaid) ſhall reſpectively be ſubject and liable to the like penalties and puniſhments, as perſons convicted of ſtealing any dog or dogs are herein before made ſubject and liable to. ſ. 2.

And for the more eaſy conviction of offenders, the juſtices may cauſe the conviction to be drawn up in the following form, or to the ſame effect, as the caſe may happen:

Be it remembred, That on the —— day of —— in the year of our Lord —— A. B. *is convicted before us —— of his majeſty's juſtices of the peace for the —— of ——* (ſpecifying the offence, and the time and place when and where the ſame was committed, as the caſe ſhall be.) *Given under our hands and ſeals, the day and year aforeſaid.* ſ. 3.

Provided, that if any perſon ſhall think himſelf or herſelf aggrieved by any thing done in purſuance of this act, ſuch perſon may appeal to the next general quarter ſeſſions, within four days after the cauſe of complaint ſhall ariſe; ſuch appellant giving 14 days notice at leaſt in writing of his intention to appeal, and of the matter thereof, to the perſon whoſe acts are complained againſt; and within two days
* 516 after ſuch notice entring into a recognizance, * before a juſtice, with two ſureties, conditioned to try ſuch appeal, and abide the order of, and to pay ſuch coſts as ſhall be awarded by the juſtices at ſuch quarter ſeſſion: And the ſaid juſtices at ſuch ſeſſion, on proof of ſuch notice and recognizance, ſhall hear and determine the appeal in a ſummary way, and award ſuch coſts to the parties appealing or appealed againſt, as they ſhall think proper: And their determination ſhall be final, and no order or other proceedings touching the conviction of any offender againſt this act ſhall be quaſhed for want of form, or be removed by *certiorari* or other writ into any of his majeſty's courts of record at *Weſtminſter*. ſ. 4.

[Here ſeem to be ſome difficulties upon this act: as,

(1) With regard to the *offence: If any perſon ſhall ſteal any dog or dogs*. It is not a mere cavil, in a caſe where a man's property or liberty

liberty is so considerably affected, to surmise, that it may be doubtful whether upon this act it is penal to steal a *bitch*. In the case of *horse stealing*, the act runs, *any horse, mare, or gelding:* And it is not usual, where a man has stolen a *mare*, to indict him for stealing a *horse*. And so tender is the law in these matters, that when by the 1 Ed. 6. c. 12. it was enacted, that no person or persons convicted of stealing horses, mares, or geldings, should be admitted to the benefit of clergy; this was not thought sufficient to exclude from the said benefit any person who shall steal only one horse, mare, or gelding; but an explanatory act (2 & 3 Ed. 6. c. 33.) was thought necessary for that purpose. And the reason is plain: What a man has a right to (as his life, liberty, or estate) by a clear and undoubted law, shall not be taken from him by a law less clear and certain. And in this very act before us, a distinction of sexes is made throughout with respect to the *offenders (him or her, himself or herself,)* which distinction being not observed with respect to the *offence*, it may possibly be argued, that in a case so penal, the statute shall not be extended further than the words will strictly bear.

(2) With respect to the *penalties:* As the clause stands, there may be a doubt concerning the application of the forfeitures for the first offence; for th it is said, that the said forfeitures or *any of them* shall be paid h to the informer and half to the poor, yet in the very next wo , following, it is said, that on nonpayment thereof the justices shall commit the offender for any time not exceeding 18 months nor less than 12, which words are only applicable to the penalty for a second or other subsequent offence.——In like manner, it seems doubtful, whether * the *whipping* shall be *517 understood for the first, or only for a subsequent offence. Also the special *time* of whipping is not clearly ascertained, being only *between the hours of twelve and one of the clock*, which may be either in the morning soon after midnight, or in the afternoon.——There is also a small mistake, where it is said, that the charges of conviction shall be ascertained by the *justice* before whom the offender shall be convicted; whereas the conviction must be by *two* justices.

(3) The clause concerning the *appeal* seemeth inconsistent, or otherwise unintelligible. The appeal must be *to the next general quarter sessions, within four days after the cause of complaint shall arise, and of this fourteen days notice shall be given to the persons whose acts are complained against.*——Whatever these words may signify, the imprisonment is still going on; for if the forfeiture is not *forthwith* paid, the offender shall be committed: And at all events, the *whipping* will be over before the appeal can commence.]

Door breaking open. See *Arrest*.

Dower. See *Forfeiture*.

Drunkenneſs. See *Alehouſes.*
Duelling. See *Homicide.*
Egyptians. See *Vagrants.*
Embracery. See *Maintenance.*

ESCAPE.

THIS is to be underſtood of eſcapes in *criminal* caſes; and not in *civil* caſes, as for debt, or the like.

Eſcape what.

An eſcape is, where one that is arreſted gaineth his liberty, before he is delivered by courſe of law. *Terms de la ley.*

Several kinds thereof.

Eſcapes are of three kinds. 1. By a perſon who hath the offender in his cuſtody; this is properly called an *eſcape.* 2. Cauſed by a ſtranger; this is commonly called a *reſcue.* 3. By the party himſelf; either without
*518 force, * which is ſimply an eſcape, or with force, which is *priſon breaking.* *Reſcous and priſon breaking* are treated of under their reſpective titles; and this title treats only of eſcapes properly ſo called. Concerning which we will treat in the following order:

I. Of eſcape by the party himſelf.
II. Eſcape ſuffered by a private perſon.
III. Eſcape ſuffered by an officer.
IV. What is a voluntary, and what a negligent eſcape.
V. Concerning the retaking of a perſon eſcaped.
VI. Indictment for an eſcape.
VII. Trial and conviction for an eſcape.
VIII. Puniſhment of an eſcape.
IX. Aiding in attempting to eſcape.

I. Of

ESCAPE.

I. Of escape by the party himself.

Escape by party himself.

As all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it; whoever in any case refuses to undergo that imprisonment which the law thinks fit to put upon him, and frees himself from it by any artifice, before such time as he is delivered by due course of law, is guilty of an high contempt, punishable with fine and imprisonment. 2 *Haw.* 122.

But escape committed by the party himself, belongs more properly to the title *Prison breaking*.

II. Escape suffered by a private person.

Escape by a private person.

It seems to be a good general rule, that wherever any person hath another lawfully in his custody, whether upon an arrest made by himself or another, he is guilty of an escape, if he suffer him to go at large, before he hath discharged himself of him, by delivering him over to some other who by law ought to have the custody of him. 2 *Haw.* 138.

And the law is generally the same, in relation to escapes suffered by private persons, as by officers. 2 *Haw.* 138.

III. Escape suffered by an officer.

Escape by an officer.

There must be a previous arrest.

1. In order to make an escape, there must be an actual arrest; and therefore if an officer having a warrant to arrest a man, see him shut up in a house, and challenge him * as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape. 2 *Haw.* 129. *519

And juſtifiable.

2. And as there muſt be an actual arreſt, ſuch arreſt muſt be alſo juſtifiable; for if it be either for a ſuppoſed crime, where no ſuch crime was committed, and the party neither indicted nor appealed, or for ſuch a ſlight ſuſpicion of an actual crime, and by ſuch an irregular mittimus as will neither juſtify the arreſt nor impriſonment, the officer is not guilty of an eſcape, by ſuffering the priſoner to go at large. 2 *Haw.* 129.

And for a criminal offence.

3. And as the impriſonment muſt be juſtifiable, ſo it muſt be alſo for a criminal offence. 2 *Haw.* 129.

And not detained only for fees.

4. Alſo if a priſoner be acquitted, and detained only for his fees, it will not be criminal to ſuffer him to eſcape, tho' the judgment were that *he be diſcharged paying his fees*, ſo that till they be payed, the firſt impriſonment continued lawful as before; for inaſmuch as he is detained, not as a criminal, but only as a debtor, his eſcape cannot be more criminal than that of any other debtor: Yet if a perſon convicted of a crime, be condemned to impriſonment for a certain time, and alſo *till he pay his fees*, and he eſcape after ſuch time is elapſed, without paying them, perhaps ſuch eſcape may be criminal, for that it was part of the puniſhment that the impriſonment be continued till the fees ſhould be paid; but it ſeems, that this is to be intended where the fees are due to others as well as to the gaoler, for otherwiſe the gaoler will be the only ſufferer by the eſcape, and it will be hard to puniſh him for ſuffering an injury to himſelf only, in the nonpayment of a debt in his power to releaſe. 2 *Haw.* 129, 130.

Too much liberty, an eſcape.

5. Alſo, it is an eſcape in ſome caſes, to ſuffer a priſoner to have greater liberty, than by the law he ought to have; as to admit a perſon to bail, who by law ought not to be bailed, but to be kept in cloſe cuſtody. 2 *Haw.* 130.

So if a gaoler, or other officer, ſhall licence his priſoner to go abroad for a time, and to come again; this is an eſcape, becauſe the priſoner is found out of the bounds of his priſon, tho' the priſoner return again, according as he ſhall be preſcribed. *Dalt.* c. 159.

Loſing ſight, an eſcape.

6. If the gaoler ſo cloſely purſues the priſoner who flies from him, that he retakes him, without loſing ſight of him, the law looks on the priſoner ſo far in his power all the time, as not to adjudge ſuch a flight to amount at all to an eſcape; but if the gaoler once loſe ſight of the priſoner, and afterwards retake him, he ſeems in ſtrictneſs to be
*520 guilty of an eſcape. And if he kill him in the purſuit, * he is in like manner guilty of an eſcape, tho' he never loſt ſight of him, and could not otherwiſe take him, not only becauſe the king loſes the benefit he might have had by the forfeiture on his attainder,

but

but alſo becauſe the publick juſtice is not ſo well ſatisfied by the killing him in ſuch an extrajudicial manner. 2 *Haw.* 130.

IV. What is a voluntary, and what a negligent eſcape.

Voluntary eſcape, what.

1. Wherever an officer, who hath the cuſtody of a priſoner, charged with and guilty of a capital offence, doth knowingly give him his liberty, with an intent to ſave him from his trial or execution, this is a voluntary eſcape. 2 *Haw.* 130.

Negligent eſcape, what.

2. A negligent eſcape is, when the party arreſted or impriſoned doth eſcape againſt the will of him that arreſted or impriſoned him, and is not freſhly purſued and taken again, before he hath loſt the ſight of him. *Dalt.* c. 159.

Suffering a priſoner to kill himſelf.

3. If the conſtable or other officer ſhall voluntarily ſuffer a thief, being in his cuſtody, to go into the water to drown himſelf, this eſcape is felony in the conſtable, and the drowning is felony in the thief: Otherwiſe if the thief ſhall ſuddenly, without the aſſent of the conſtable, kill, hang, or drown himſelf, this is but a negligent eſcape in the conſtable. *Dalt* c. 159.

I. Concerning the retaking of a perſon eſcaped.

Let go voluntarily cannot be retaken.

1. If an officer hath arreſted a man by virtue of a warrant, and then taketh his promiſe that he will come again, and ſo letteth him go; the officer cannot, after arreſt, take him again by force of his former warrant, for that this was by the conſent of the officer: But if he return, and put himſelf again under the cuſtody of the officer, it ſeems that it may be probably argued, that the officer may lawfully detain him, and bring him before the juſtice in purſuance of the warrant. *Dalt.* c. 169. 1 *Haw.* 81.

Freſh ſuit.

2. But if the party arreſted had eſcaped of his own wrong, without the conſent of the officer, now upon freſh ſuit, the officer may take him again and again, ſo often as he eſcapeth, although he were out of view, or that he ſhall fly into another town or county, and bring him before the juſtice, upon whoſe warrant he was firſt arreſted. *Dalt.* c. 169.

And it is ſaid generally in ſome books, that an officer who hath
*521 negligently ſuffered a priſoner to eſcape, may * retake him where-ever he finds him, without mentioning any freſh purſuit; and indeed ſince the liberty gained by the priſoner is wholly owing to his own wrong, there ſeems to be no reaſon he ſhould take any manner of advantage from it. 2 *Haw.* 131, 132.

Breaking open doors to retake.

3. And wherever a perſon is lawfully arreſted for any cauſe, and afterwards eſcapes, and ſhelters himſelf in an houſe, the doors may be broke open to take him, on refuſal of admittance. 2 *Haw.* 87.

Retaking excuſeth not the eſcape.

4. It is perhaps the better opinion, that wherever a priſoner, by the negligence of his keeper, gets ſo far out of his power, that the keeper loſes ſight of him, the keeper is puniſhable for the eſcape, notwithſtanding he retook him immediately after: And it is clear, that he cannot excuſe himſelf from an eſcape, by killing a priſoner in the purſuit, tho' he could not poſſibly retake him; but muſt in ſuch caſe be content to ſubmit to ſuch puniſhment, as his negligence ſhall appear to deſerve. 2 *Haw.* 132.

VI. Indictment for an eſcape.

Indictment.

It ſeems clear, that every indictment (A) for an eſcape, whether negligent or voluntary, muſt expreſsly ſhew, that the priſoner was actually in the defendant's cuſtody for ſuch a crime; and that he went at large: And if for a voluntary eſcape, that the defendant feloniouſly and voluntarily ſuffered him to go at large; and muſt ſet forth, not the felony in general, but the particular kind of felony: But it ſeems queſtionable, whether ſuch certainty, as to the nature of the crime, be neceſſary in an indictment for a negligent eſcape; for that it is not material in this caſe, whether the perſon who eſcaped were guilty or not. 2 *Haw.* 133, 229.

VII. Trial and conviction for an eſcape.

Gaoler not producing him, a conviction.

1. If the priſoner be of record in a court, and the gaoler being called, cannot give an account where he is, this is a conviction of an eſcape; but ſeems not a conviction of a voluntary eſcape, unleſs the gaoler confeſſeth it: And the gaoler may be fined in ſuch a caſe; but not convicted of felony, without indictment or preſentment. 1 H. H. 599, 603.

2. And

2. And it ſeems to be clear, that a keeper who voluntarily ſuffers another to eſcape, who was in his cuſtody * for felony, cannot be arraigned for ſuch eſcape as for felony, until the principal be attainted, for that the felony of the priſoner ſhall not be tried between the king and the keeper, becauſe the priſoner is a ſtranger thereunto; yet he may be indicted and tried for it as a miſpriſion, before the attainder of the principal offender. 2 *Haw.* 135. 2 Inſt. 591, 592.

Felony to be tried before the eſcape.

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VIII. Puniſhment of an eſcape.

1. If a felon eſcapes before arreſt, it is not puniſhable in him as felony; but for the flight he forfeits his goods when preſented. *Hale's Pl.* 111.

Puniſhment of eſcape before arreſt.

2. If a private perſon arreſt a felon, and he eſcape by force from him, the townſhip ſhall be amerced, but it ſeems it excuſeth the party, becauſe he cannot raiſe power to aſſiſt him; but if a conſtable or other officer hath the cuſtody of a priſoner bringing him to the gaol, it ſeems that a ſimple eſcape by the reſcue of the priſoner himſelf, doth not wholly excuſe him, becauſe he may take ſufficient ſtrength to his aſſiſtance. 1 H. H. 601.

Of eſcape by a private perſon.

3. Wherever a perſon is found guilty upon an indictment or preſentment of a negligent eſcape of a criminal actually in his cuſtody, he is puniſhable by fine and impriſonment, according to the quality of the offence. 2 *Haw.* 136, 139. 1 H. H. 600, 604.

Of a negligent eſcape.

And it ſeems to be the better opinion, that the ſheriff is as much liable to anſwer for a negligent eſcape ſuffered by his bailiff, as if he had actually ſuffered it himſelf, and that the court may charge either the ſheriff or bailiff for ſuch an eſcape; and if a deputy gaoler be not ſufficient to anſwer a negligent eſcape, his principal muſt anſwer for him. 2 *Haw.* 135.

Note; Mr. *Hawkins*, altho' he is one of the moſt accurate of all writers, yet hath inſerted in this place certain penalties for eſcapes, which were expired above 200 years before. 2 *Haw.* 137.

If a priſoner for felony break the gaol, this ſeems to be a negligent eſcape in the gaoler, becauſe there wanted either that due ſtrength in the gaol, that ſhould have ſecured him, or that due vigilance in the gaoler or his officers to have prevented it; and therefore it is lawful for the gaoler to hamper them with irons to prevent their eſcape; for if gaolers might not be puniſhed for this as a negligent eſcape, they would be careleſs either to ſecure their priſoners, or to retake them that eſcape. 1 H. H. 601.

*523 *Of a voluntary escape.*

* 4. It seems to be generally agreed, that a voluntary escape suffered by an officer, amounts to the same kind of crime, and is punishable in the same degree as the offence of which the party was guilty, and for which he was in custody, whether it be treason, felony, or trespass. 2 *Haw.* 134.

But yet a voluntary escape is no felony, if the act done were not felony at the time of the escape made, as in case of a mortal wound given, and the party not dying till after the escape; but the officer may be fined to the value of his goods. *Dalt.* c. 159.

Also a voluntary escape suffered by one who wrongfully takes upon him the keeping of a gaol, seems to be punishable in the same manner, as if he was never so rightfully intitled to such custody; for that the crime is in both cases of the same ill consequence to the publick: and there seems to be no reason that a wrongful officer should have greater favour than a rightful, and that for no other reason but because he is a wrongful one. 2 *Haw.* 134.

But it seemeth to be clear, that no one is punishable as for felony, for the voluntary escape of a felon, but the person only who is actually guilty of it; and therefore that the principal gaoler is only fineable for a voluntary escape suffered by his deputy; for that no one shall suffer capitally for the crime of another. 2 *Haw.* 135.

And therefore, altho' in all civil causes, the sheriff is to be responsible, or the gaoler, at election, yet if the gaoler do voluntarily suffer a felon in his custody to escape; this, inasmuch as it reacheth to life, is felony only in the gaoler, that was immediately trusted with the custody, and not in the sheriff. 1 H. H. 597.

For the escape must be voluntarily permitted in him that permitted it, which could not be in the high sheriff, tho' it were such in the gaoler, for he was not privy to it, and therefore could not do it feloniously; but it was a negligent escape in him, in trusting such a person with the custody of his prisoners, that would be false to his trust, and therefore the sheriff shall pay, but not corporally suffer for the miscarriage of his gaoler. 1 H. H. 597, 598.

But altho' the felony for which a man is committed be not within clergy; yet the person who voluntarily suffers him to escape, shall have the benefit of clergy. 1 H. H. 599.

*524 * *IX. Aiding in attempting to escape.*

Aiding in attempting to escape.

By the 16 G. 2. c. 31. If any person shall assist any prisoner to *attempt* his escape from any gaol, though no escape be actually made, if such prisoner was then attainted or convicted of treason or

or felony (except petty larceny), or unlawfully committed to, or detained in any gaol, for treaſon or felony (except petty larceny) expreſſed in the warrant of commitment; he ſhall be guilty of felony, and be tranſported for ſeven years; and if ſuch priſoner was then convicted of, or detained in gaol for petty larceny, or any other crime not being treaſon or felony, expreſſed in the warrant of commitment, or was then in gaol for debt amounting to 100l, he ſhall be guilty of a miſdemeanor, and be liable to fine and impriſonment.

And if any perſon ſhall convey, or cauſe to be conveyed any *diſguiſe, inſtrument, or arms,* to any priſoner in gaol, or to any other perſon there for his uſe, without conſent of the keeper; ſuch perſon, although *no eſcape or attempt* be actually made, ſhall be deemed to have delivered ſuch diſguiſe, inſtrument or arms, with an intent to aſſiſt ſuch priſoner to eſcape or attempt to eſcape; and if ſuch priſoner then was attainted or convicted of treaſon or felony (except petty larceny), or lawfully detained in gaol for treaſon or felony (except petty larceny) expreſſed in the warrant of commitment;—he ſhall be guilty of felony, and be tranſported for ſeven years: but if the priſoner was then convicted or detained for petty larceny, or any other crime not being treaſon or felony, expreſſed in the warrant of commitment, or for debt amounting to 100l, he ſhall be guilty of a miſdemeanor, and liable to fine and impriſonment.

And if any perſon ſhall aſſiſt any priſoner to attempt to eſcape *from any conſtable,* or other perſon, who ſhall have the lawful charge of him, in order to carry him to gaol, by virtue of a warrant of commitment for treaſon or felony, (except petty larceny); or if any perſon ſhall aſſiſt any felon to attempt his eſcape from on board any *boat or veſſel carrying felons for tranſportation,* or from the *contractor* for the tranſportation of ſuch felons, or his agents, he ſhall be guilty of felony, and be tranſported for ſeven years.

All proſecutions on this act to be commenced within a year after the offence committed.

* A. Indictment againſt a conſtable for an eſcape. *525

Weſtmorland. THE *jurors for our lord the king upon their oath preſent, That on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— *at* ——— *in the county aforeſaid, one* A. I. *of* ——— *came before* J. P. *eſquire, then and yet on of the juſtices of our ſaid lord the king, aſſigned to keep the peace in the ſaid county, and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in the ſaid county committed; and the ſaid* A. I. *did, then and there, on his oath, before the ſame juſtice, charge, accuſe, and give information againſt one* A. O. *of* ——— *aforeſaid, in the*

the county aforesaid, yeoman, for a certain misdemeanor, in taking fish out of the pond of ——— at ——— in the said county [or, as the offence shall be:] *Whereupon he the said* J. P. *the justice aforesaid, did then and there, to wit, at ——— aforesaid, in the county aforesaid, make a certain warrant, under his hand and seal, in due form of law, directed to the constable of ——— aforesaid, in the county aforesaid, thereby requiring him the said constable to take the body of the said* A. O. *and bring him before the said* J. P. *the justice aforesaid, to answer to such matters and things as should be alledged against him, touching the said misdemeanor: Which said warrant, afterwards, to wit, on the same day and year above mentioned, at ——— aforesaid, in the county aforesaid, was delivered to one* A. C. *then being constable of ——— aforesaid, in due form of law, to be executed; by virtue of which said warrant the said* A. C. *afterwards, to wit, on the said ——— day of ——— in the year aforesaid, at ——— aforesaid, in the said county, did take and arrest the body of the said* A. O. *and him the said* A. O. *in his custody for the cause aforesaid, had: Nevertheless, the said* A. C. *of ——— aforesaid, in the county aforesaid, yeoman, afterward, to wit, on the said ——— day of ——— in the year aforesaid, the duty of his office in that part not regarding at ——— aforesaid, in the county aforesaid, unlawfully and negligently did permit the said* A. O. *to escape, and go at large, out of the custody of him the said* A. C. *to the great hindrance of justice, in contempt of our said lord the king, and of his laws, and against the peace of our said lord the king, his crown and dignity.*

Escheat. See *Forfeiture.*

And herein also of goods *waived.*

Estray, what.

1. ESTRAY *is, where any horses, sheep, hogs, beasts, or swans, do come into a lordship, and are not owned by any man.* Kitch. 23.

Where any horses, sheep, hogs, beasts, or swans] Bees, and other creatures of a wild nature, are not within this description, and therefore not to be reckoned amongst stray goods: nevertheless it seemeth

ſeemeth that a ſwarm of bees, of which the owner hath loſt ſight, and conſequently can make out no property, may be ſeized for the uſe of the king, or of the lord of the manor; for it is a maxim of the common law, that ſuch goods whereof no one can claim property do belong to the king; and that which the king hath he may grant to another, and conſequently another may preſcribe to have the ſame, within ſuch a precinct or lordſhip. And therefore it is ſaid, that if any take honey or ſwarms of bees within the demeſne of the lord, it is inquirable in the court baron. *Kitch.* 114.

Swans] Swans that be unmarked and wild (being at large and abroad) may be ſeized by the ſheriff for the uſe of the king, by his prerogative. *Dalt. Sher.* 80.

Alſo ſwans marked and tame may be eſtrays. *Kitch.* 86. But it ſeemeth that no other fowl can be eſtray. *Wood*, b. 2. c. 2.

Do come into a lordſhip] That is, where the goods have no right to be; and therefore an eſtray cannot be in ſuch place, where the party hath a right of common. *Dalt. Sher.* 79.

And are not owned by any man] Whereupon (as hath been ſaid) the property accrueth to the king; and the cattle of the king cannot be eſtrays, nor forfeited as ſuch to the lord of the manor. *Kitch.* 81.

2. Waif is, where a felon in purſuit waiveth the goods; or where the felon, for fear of being apprehended, thinking that a purſuit was made, having them with him in his poſſeſſion, fleeth and waiveth, caſteth away, or goeth from the goods: in theſe caſes, they ſhall be ſaid to be waived in law. But if he hath not the goods with him, when he fleeth being purſued, or for fear to be apprehended, they are not waived nor forfeited, but the owner may take * them when he will, without any freſh ſuit. 5 *Co.* 109. *Dalt. Sher.* 78. *Waif, what.* *527

But if the thief in his flight waive them, there the goods are forfeited to the king or lord of the liberty by the common law, if the felon upon freſh ſuit was not attainted at the ſuit of the owner of the goods: And the reaſon why waif is given to the king, and that the party ſhall loſe his property in ſuch caſe, is for default in the owner that he purſued not freſhly to apprehend the felon; for it concerneth the publick that crimes do not remain unpuniſhed. And therefore the law hath impoſed this penalty upon the owner, that if the thief by his induſtry and freſh ſuit be not attainted at his ſuit, in an appeal of the ſame felony, he ſhall loſe for his default all his goods which the thief at the time of his flight waived: But if the thief had them not with him when he fled, having peradventure hid them, there no default can be in the party; and therefore they ſhall not be forfeited, for if he maketh freſh ſuit after notice of the felony it ſufficeth. 5 *Co.* 109.

Seizure thereof by the lord.

3. Heretofore waifs and ſtrays were the finder's, by the law of nature; and afterward, the king's, by the law of nations. *Dalt. Sher.* 79.

Thus, one as a bailiff or ſervant to the ſheriff ſeized a horſe as an eſtray to the king's uſe, and proclaimed him, according to law, and after the year and day ſold him, and the ſheriff accounted him in the exchequer. *Dalt. Sher.* 80.

But now kings have granted this, and ſuch like prerogatives, unto their ſubjects, within their liberties; ſo that waifs and ſtrays are in many places the lord's of the franchiſe where they are found. *Dalt. Sher.* 79.

And therefore waived goods and eſtrays ſhall be *ſeized* by the officer of the king, to the uſe of the king; or by the officer or bailiff of the lord, who hath ſuch things by grant of the king, or by preſcription, to the uſe of the lord. *Dalt. Sher.* 80.

But if one have a waif, and it be taken out of his manor, he ſhall have *treſpaſs* without ſeizing, and though he do not ſeize it. *Kitch.* 81.

Proclaiming the goods ſeized.

4. It ſeemeth to be agreed, that waifs and ſtrays ought to be proclaimed in the two next market towns; and that if they are not proclaimed, the owner may take the ſtray goods again at any time: And it ſeemeth to be the general tenor of the old books, that they ought alſo to be proclaimed in the church: Which courſe it ſeemeth beſt to follow; to the end that the owner, who in this caſe is no wrong doer, may have a reaſonable mean to come at his
* 528 goods again; that is to ſay, that the goods be proclaimed * at the leaſt thrice, to wit, in the two market towns next adjoining to the place where they ſtrayed, on the market days reſpectively, and at the church door on a *Sunday*, as the people come out of the church. *Kitch.* 23, 81, 105. *Dalt. Sher.* 79. *Cro. Eliz.* 716.

How waifs or ſtrays are to be kept.

5. And they ought to be wreathed; and to be put in ſome ſeveral ground in an open place, and not in any covert of wood, that the owner may have a view of them; for if they be in covert the property is not changed, tho' they be there a year and a day. *Kitch.* 23.

An eſtray is not to be uſed in any manner, except in caſe of neceſſity, as to milk a cow, or the like; but not to ride an horſe, for within the year and day he hath not any property in him. *Cro. Jac.* 147, 8.

Owner claiming.

6. He who taketh an *eſtray*, may keep it until he be ſatisfied for the finding, keeping, and proclaiming thereof. *Dalt. Sher.* 79.

But the owner (if it be within the year and a day) may take it without telling any marks, or making any proof of property; but this may be done upon the trial, if conteſted. 2 *Salk.* 686.

And

And the lord ought to make a demand of what the amends ſhould be; and then if the party thinks the demand unreaſonable, he may tender ſufficient amends; and if the lord ſhall not accept it, this ſhall be ſettled by the jury upon trial.

But it is ſufficient in this caſe to tender amends *generally*, without expreſſing any certain ſum. For there is a difference between this caſe, and that of a tender of amends for treſpaſs. In that of a treſpaſs, if the defendant pleads a tender of amends, he muſt ſhew what he tendred; for he muſt tender a certain ſum. And the law puts this difficulty upon him, becauſe he is the wrong doer: But the owner of the ſtray (as hath been ſaid) is no wrong doer; and it is impoſſible he ſhould know how long his beaſt hath been in the lord's cuſtody, nor how much will make a proper ſatisfaction. 2 Salk. 686.

In the caſe of goods *waived*; the owner may ſeize them twenty years after, if the lord of the franchiſe, nor the king ſeized before; but if they are ſeized, then they become forfeited to the king or lord of the liberty. *Kitch.* 82.

And this forfeiture is not like a ſtray, where tho' the lord may ſeize, yet the party who is the owner may retake them within the year and day; but here the true owner cannot ſeize his own goods, tho' upon freſh ſuit within the year and day. 1 *H. H.* 541.

* But this is not an abſolute loſs of the owner's goods, but rather an expedient ſettled by law, to drive the owner to convict the felon by proſecuting his appeal; and therefore if he make freſh ſuit, and proſecute his appeal, and the felon be thereupon convict or attaint, and the freſh ſuit be enquired and found by verdict or inqueſt of office, he ſhall have reſtitution of the goods ſo waived. 1 *H. H.* 541. *529

Property accruing to the lord, on not claiming.

7. Waifs and ſtrays, not claimed within the year and day, are the lord's. *Kitch.* 23, 80, 81.

For where the lord hath by a year and a day a beaſt, and it be cried in the church and markets, the property is changed. *Kitch.* 80.

That is to ſay, after he hath the beaſt a year and day from the time of the proclamation, and not from the time of the ſeizure: for after the firſt proclamation it becometh an eſtray, but not ſooner. 11 *Mod.* 89.

If the eſtray within the year eſtray out of the manor, the lord may chaſe back the eſtray unleſs it be ſeized by another lord who hath eſtrays; but if it be ſeized by ſuch other lord, then the firſt hath loſt all poſſibility of his gaining the property, and the other lord ought to proclaim it *de novo*. Finch. 177. Kitch. 81. Hutt. 67.

ESTREAT.

Eſtreat, what. 1. ESTREAT *(extractum)* is uſed for the true copy or note of ſome original writing or record, and eſpecially of fines and amerciaments, impoſed in the rolls of a court, to be levied by the bailiff or other officer.

Making out the eſtreats. 2. The juſtices and judges before whom fines or amerciaments ſhall be, ſhall charge the clerks of the eſtreats, by their oath to be made, that they make the rolls of ſuch eſtreats diſtinctly, by expreſs words, of the cauſe of the loſs, of the term of the year, and the nature of the writ, and betwixt what parties ſuch iſſues or amerciaments ſhall be loſt, as well in the king's ſuit, as in the ſuit of the party. 7 *H.* 4. *c.* 3.

Delivering the ſame to the ſheriff. 3. All clerks of the peace, and town clerks, ſhall deliver to the ſheriff, within 20 days after *Sep.* 29, yearly, a perfect eſtreat or ſchedule of all fines, iſſues, amerciaments, and other forfeitures whatſoever, forfeited in any ſeſſions before *Michaelmas*; on pain of 5ol. half to the * king, and half to him that ſhall ſue. 22 & 23 *C.* 2. *c.* 22. *ſ.* 7. 8

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And into the court of exchequer. 4. And ſhall alſo yearly, on or before the ſecond *Monday* after the morrow of *All Souls*, deliver into the court of exchequer, a duplicate, certificate, and eſtreat of ſuch eſtreats and ſchedules, ſo delivered to the ſheriff; on the like pain of 5ol. *id. ſ.* 8. And likewiſe they may be further amerced by the barons of the exchequer. 3 *G.* *c.* 15. *ſ.* 12.

And upon delivery thereof, they ſhall take the following oath, to be adminiſtered by one of the barons:

"You ſhall ſwear, that theſe eſtreats now by you delivered, are "truly and carefully made up and examined; and that all fines, "iſſues, amerciaments, recognizances, and forfeitures which were "ſet, loſt, impoſed, or forfeited, and in right and due courſe of "law ought to be eſtreated in the court of exchequer, are, to the "beſt of your knowledge and underſtanding, therein contained; "and that in the ſame eſtreats are alſo contained and expreſſed all "ſuch fines, as have been paid into the court, from which the ſaid "eſtreats are made, without any wilful or fraudulent diſcharge, "omiſſion, miſnomer, or defect whatſoever: So help you God." 4 & 5 *W.* *c.* 24. *ſ.* 5.

Penalty of making default. 5. And if he ſhall withhold, or miſcertify the ſame, he ſhall forfeit treble, half to the king, and half to him that ſhall ſue, and ſhall alſo loſe

loſe his office, and be incapable to hold any office in the revenue. 22 & 23 C. 2. c. 22. ſ. 9.

Party coming in after the eſtreat.

6. If recognizances be eſtreated into the exchequer, becauſe not punctually complied with; yet if the party appears and takes his trial the next ſeſſions, or otherwiſe performs what he was bound to by the recognizance as the caſe ſhall be, he may compound for a very ſmall matter in the court of exchequer; becauſe the effect, tho' not the exact form of the recognizance, is complied with. 10 Mod. 278.

Proceſs for levying.

7. Where any fine or forfeiture ſhall be paid to the ſheriff, clerk of the peace, or other officer, and ſo certified into the exchequer; proceſs ſhall be awarded to the ſheriff againſt ſuch perſon for levying the ſame. 22 & 23 C. 2. c. 22. ſ. 10.

Sheriff's duty in levying.

8. And in levying, the ſheriff ſhall ſhew the eſtreats under the ſeal of the exchequer, to the party indebted; on pain of treble damages to the party, and fine to the king, on conviction before the juſtices of the peace, or other juſtices. 42 Ed. 3. c. 9.

Eſtreats in the torn.

*9. And the ſheriff ſhall make no eſtreats to levy his own amerciaments (that is to ſay, in the torn), till two juſtices (1 Q.) to be named at *Michaelmas* ſeſſions by the *cuſtos rotulorum*, or in his abſence by the eldeſt in the commiſſion, have inſpected his books; and the ſaid eſtreats ſhall be indented betwixt the ſaid juſtices and ſheriff, ſealed with their ſeals, the one part to remain with the juſtices, and the other with the ſheriff: And the perſons who ſhall gather the ſaid amerciaments, ſhall be ſworn by the ſaid juſtices, that they ſhall take no more than is forfeited, and contained in the ſaid eſtreats. 11 H. 7. c. 15. *553

Form of the eſtreat.

Weſtmorland. AN extract of all the iſſues, fines, amerciaments and recognizances, ſet, loſt, impoſed and forfeited to our ſovereign lord the king, at the general quarter ſeſſions of the peace of our ſaid lord the king, holden at —— in and for the ſaid county of —— on —— the —— day of —— in the —— year of the reign of —— before —— eſquires, juſtices of our ſaid lord the king, aſſigned to keep the peace in the ſaid county, and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in the ſaid county committed, *Joſhua Nicholſon*, gentleman, clerk of the peace for the county aforeſaid, then and there attending:

Of *A. O.* late of —— in the ſaid county, labourer, for a treſpaſs and aſſault at —— aforeſaid, in the ſaid

county,

county, whereof he is indicted and convicted; his fine set at five shillings, which he paid to the sheriff in court. l. s. d. 0 5 0

Of *A. O.* of —— in the said county, yeoman, because he came not now here to answer to such things as against him, on the part of our said lord the king, should be objected, as by a certain recognizance taken before *J. P.* esquire, one of the justices of our said lord the king, assigned to keep the peace in the said county, he undertook - - - - - - - - 10 0 0

Of *A. S.* of —— in the said county, yeoman, one of the pledges of the said *A. O.* because he had him not to answer as above - - - - 5 0 0

Of *B. S.* of —— in the said county, yeoman, the other of the pledges of the said *A. O.* for the like 5 0 0

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*EVIDENCE.

I. Of evidence in general.
II. Of written evidence.
III. Of the evidence of witnesses.
IV. Of process to cause witnesses to appear.
V. Of the manner of giving evidence.

I. Of evidence in general.

Evidence, what.

1. EVIDENCE in legal understanding, doth not only contain matters of record, as letters patents, fines, recoveries, inrolments, and the like, and writings under seal, as charters and deeds, and other writings without seal, as court rolls, accounts, and the like; but in a larger sense it containeth also the testimony of witnesses, and other proofs to be produced and given, for the finding of any issue joined between the parties. And it is called *evidence*, because thereby the point in issue is to be made evident to the jury. 1 Inst. 283.

2. But

2. But it is a general rule in all caſes, civil and criminal, the beſt evidence that may be had, or that the nature of the thing will bear, is to be given; and it is upon this reaſon, that a copy of the record is admitted, becauſe one cannot have the record itſelf; but a copy of a copy will not do. Law of Evid. 286. *The beſt evidence is required.*

3. Many times juries, together with other matter, are much induced by preſumptions: whereof there are three ſorts, violent, probable, and light or temerary. Violent preſumption many times amounts to full proof; as if one be run through the body with a ſword in a houſe, whereof he inſtantly dieth, and a man is ſeen to come out of that houſe, with a bloody ſword, and no other man was at that time in the houſe. Probable preſumption moveth little; but light or temerary preſumption moveth not at all. 1 Inſt. 6. *Preſumptive evidence.*

If all the witneſſes to a deed be dead (as no man can keep his witneſſes alive, and time weareth out all men) then violent preſumption, which ſtands for a proof, is continual and quiet poſſeſſion; altho' the deed may receive credit from a comparing of ſeals, writing, and the like. 1 Inſt. 6.

4. The common law did not require any certain number of witneſſes, for the trial of any crime whatſoever. 2 Haw. 428. *What number of witneſſes are required.*

* And before a juſtice of the peace in divers caſes, one witneſs is ſufficient to convict an offender; the ſame being directed by ſpecial ſtatutes. *533

But in caſe of high treaſon, whereby corruption of blood ſhall be made, no perſon ſhall be attainted, but upon the oaths of two witneſſes, either both to the ſame overt act, or one of them to one, and the other of them to another overt act of the ſame treaſon. 7 W. c. 3. ſ. 2.

In like manner, in thoſe courts which proceed by the rules of the civil law, as the ſpiritual court, and the courts of equity, two witneſſes are generally required; and the reaſon why the civil law requires two witneſſes is, becauſe their trial is by witneſſes, and not by a jury of twelve men. But where the trial is by verdict of twelve men, there the judgment is not given upon witneſſes, or other kind of evidence, but upon the verdict; and upon ſuch evidence as is given to the jury, they give their verdict. 1 Inſt. 6. b. Plowd. 12. a.

By 29 C. 2. c. 3. ſ. 5. Deviſes of lands ſhall be atteſted by three witneſſes at the leaſt.

II. Of written evidence.

Acts of parliament.

1. Acts of parliament relate either to the kingdom in general, and are therefore call *general* acts of parliament; or only to the concerns of private perſons, and are thence called *private* acts of parliament. Theory of Evid. 2.

A general act of parliament is taken notice of by the judges and jury, without being ſhewed; and hence it is that it hath been ſaid, that the printed ſtatute book is good evidence of general acts of parliament; not that the printed ſtatutes are the perfect and authentic copies of the records themſelves, but every perſon is ſuppoſed to know the law; and therefore the printed ſtatutes are allowed to be evidence, becauſe they are the hints of that which is ſuppoſed to be lodged in every man's mind already. Id. 2, 8.

But in the caſe of private acts of parliament, the printed ſtatute book is not evidence, though reduced into the ſame volume with the general ſtatutes; but the party ought to have a copy compared with the parliament roll; for they are not conſidered as already lodged in the minds of the people. Id. 8.

However, a private act of parliament, that is in print, which concerns a whole county (as the act of *Bedford Level*) or a large body of
*534 people (as the whole clergy in * general) hath been allowed to be given in evidence, without comparing it with the record; and theſe things are the rather admitted, becauſe they gain ſome authority from being printed by the king's printer; and beſides, from the notoriety of the ſubject of them, they are ſuppoſed not to be wholly unknown. Id. 8.

Records of courts.

2. Records of the king's courts prove themſelves and cannot be proved by witneſſes. But copies of them muſt be proved by witneſſes, and then they are good evidence. No razure or interlining ſhall be intended in them. But the ſureſt way is, to exemplify a record under the great ſeal, or at leaſt under the ſeal of the court. 10 Co. 92.

And nothing ſhall be admitted as evidence of what was done at another trial, till the record of that trial be produced. Read Evid.

But a record of a criminal conviction ſhall not be given in evidence in a civil action; becauſe ſuch conviction might have been upon the evidence of a party intereſted in the civil action. Caſes in the time of lord Hardwicke, 312.

Rolls of court not of record.

3. There are alſo other publick matters that are not records, as court rolls, and tranſactions in chancery; and of theſe, copies may be given in evidence. Theory of Evid. 22, 23.

The

The reaſon why the proceedings in chancery are not record is this, becauſe they are not the precedents of juſtice; for the judgment there is, according to equity and good conſcience, and not according to the laws and cuſtoms. And the reaſon why any record is of validity and authority is, becauſe it is a memorial of what is the law of the nation; now chancery proceedings are no memorials of the laws of *England*, becauſe the chancellor is not bound to proceed according to the laws. Id. 23.

The rolls of a court baron are evidence; for they are the publick rolls, by which the inheritance of every tenant is preſerved; and they are the rolls of the manor court, which was anciently a court of juſtice relating to all property within the diſtrict. Id. 43.

4. Depoſitions of witneſſes may be read when the witneſs is dead, but not when the witneſs is living; for whilſt the witneſs is living, they are not the beſt evidence the nature of the thing is capable of. Theory of Evid. 30. *Depoſitions.*

Yet they may be read when a witneſs is ſought and cannot be found; for then he is in the ſame circumſtances, as to the party that is to uſe him, as if he were dead. Id.

So if it is proved that a witneſs was ſubpœnaed, and fell ſick by the way; for in this caſe likewiſe, the depoſition is * the beſt evidence that can be had, and that anſwers what the law requires. Id. * 535

But a depoſition cannot be given in evidence againſt any perſon that was not party to the ſuit; and the reaſon is, becauſe he had not liberty to croſs-examine the witneſs; and it is againſt natural juſtice, that a man ſhould be concluded by proofs in a cauſe to which he was not a party. For this reaſon, depoſitions in chancery ſhall not be read for or againſt the defendant upon an information or indictment, for the king was no party to the ſuit. Id.

Yet this rule admits of ſome exceptions; as particularly, in all caſes where hearſay and reputation are evidence; for undoubtedly what a witneſs, who is dead, hath ſworn in a court of juſtice, is of more credit than what another perſon ſwears he hath heard him ſay. So a depoſition taken in a cauſe between other parties, will be admitted to be read, to contradict what the ſame witneſs ſwears at a trial. Id. 30, 31.

It is a general rule, that depoſitions taken in a court not of record, ſhall not be allowed in evidence elſewhere. So it hath been holden in regard to depoſitions in the eccleſiaſtical court, tho' the witneſſes were dead. So where there cannot be a croſs-examination, as depoſitions taken before commiſſioners of bankrupts, they ſhall not be read in evidence. Id. 33, 34.

But it ſeems to be ſettled, that the examination of an informer taken upon oath, and ſubſcribed by him, either before a coroner upon an inquiſition of death, or before juſtices of the peace, in purſuance of the ſtatutes of *Phil. & Mar.* upon a bailment or commitment for any felony, may be given in evidence at the trial, if it be made out by oath to the ſatisfaction of the court, that ſuch informer is dead, or unable to travel, or kept away by the means or procurement of the

priſoner, and that the examination offered in evidence is the very ſame that was ſworn before the coroner or juſtice, without any alteration whatſoever. 2 Haw. 429.

But it hath been adjudged, that it is not ſufficient to authoriſe the reading of ſuch examination, to make oath that the proſecutors have uſed all their endeavours to find the witneſs, but cannot find him. 2 Haw. 430.

But it is ſaid to have been adjudged, by the court of king's bench, in the 7 W. (1 Salk. 281.) upon advice with the juſtices of the common pleas, on an indictment for a *libel*, that depoſitions taken before a juſtice of the peace, relating to the fact, could not be given in evidence, though the deponent were dead; and that the reaſon why
*536 * ſuch depoſitions may be given in evidence in *felony*, depends upon the ſtatutes of *Phil. & Mar.* and that this cannot be extended farther than the particular caſe of felony. But in the report of this caſe, 5 Mod. 165. it is ſaid, that the reaſon why ſuch depoſitions could not be read, was becauſe the defendant was not preſent when they were taken, and therefore had not the benefit of a croſs-examination. 2 Haw. 430.

Anciently, depoſitions taken *in perpetuam rei memoriam* were not publiſhed till after the death of the witneſſes, becauſe they were no evidence while the witneſſes were living; but this practice was found very inconvenient, becauſe thereby witneſſes became ſecure in ſwearing whatever they pleaſed, inaſmuch as they never could be proſecuted for perjury. Theory of Evidence. 32.

What a man himſelf, who is living, hath ſworn at one trial, can never be given in evidence at another to ſupport him, becauſe it is no evidence of the truth; for if a man be of that ill mind to ſwear falſely at one trial, he may do the ſame at another on the ſame inducements; but what a man ſays in diſcourſe, without premeditation or expectation of the cauſe in queſtion, is good evidence to ſupport him, becauſe that ſhews that what he ſwears is not from any undue influence. But if a man hath ſworn at one trial different from what he hath ſworn at another, this is good evidence as to his diſcredit. Id. 35.

Verdict. 5. No verdict ſhall be given in evidence, but between ſuch who were parties or privies to it; becauſe otherwiſe a man would be bound by a deciſion, who had not the liberty to croſs-examine: and nothing can be more contrary to natural juſtice, than that any body ſhould be injured by a determination, that he, or thoſe under whom he claims, was not at liberty to controvert. Theory of Evid. 18, 19

And a verdict will not be admitted in evidence, without likewiſe producing a copy of the judgment founded upon it; becauſe it may happen, that the judgment was arreſted upon a new trial granted. But this rule doth not hold, in the caſe of a verdict on an iſſue directed out of chancery; becauſe it is not uſual to enter up judgment in ſuch caſe; and the decree of the court of chancery is equally proof that the verdict was ſatisfactory, and ſtands in force. Id. 21.

6. A de-

6. A decree in chancery may be given in evidence between the ſame parties, or all claiming under them; for their judgments muſt be of authority in theſe caſes, where the law gives them a juriſdiction: for it would be very abſurd, that the law ſhould give them a juriſdiction, and * yet not ſuffer what is done by force of that juriſdiction to be full proof. *Theory of Evid.* 36, 37. *Sentence or final judgment.*

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And note, wherever a matter comes to be tried in a collateral way, the decree, ſentence, or judgment of any court, eccleſiaſtical or civil, having competent juriſdiction, is concluſive evidence of ſuch matter: and in caſe the determination is final in the court, of which it is a decree, ſentence, or judgment, ſuch decree, ſentence, or judgment will be concluſive in any other court having concurrent juriſdiction. *id* 37.

7. In the caſe of *Benſon* and *Olive* in the exchequer, T. 3 G. 2 a deed was offered to be produced, which bore date 38 years before, without proving that the witneſſes were dead. And allowed by the court. They ſaid that in general 40 years was allowed to be the rule; but the courts never tied themſelves up ſtrictly to that rule, but 39, 38, nay 35, have been allowed the ſame. 1 *Barnard.* 348. *Ancient deed.*

And E. 11 G. 2. *Porter* and *Gordon.* Upon a trial at bar, a deed was offered in evidence, executed 36 years ago, without proving the hands; which was oppoſed by the other ſide; but admitted by the court, who ſaid, there was no fixed rule about it, but that it had often been allowed, where a deed was but 25 or 30 years old. 12 *Viner.* 57.

8. In caſes where writings have been loſt by burning of houſes, by rebellion, or when robbers have deſtroyed them, or the like; the law, in ſuch caſes of neceſſity, allows them to be proved by witneſſes. *Jenk.* 19. *Wood,* b. 4. c. 4. *Writings loſt or concealed.*

If a man deſtroys a thing that is deſigned to be evidence againſt himſelf, a ſmall matter will ſupply it; and therefore the defendant having torn his own note ſigned by him, a copy ſworn was admitted to be good evidence to prove it. L. *Raym.* 731.

Where the defendant himſelf has the deed which concerns the land in queſtion, and refuſes (after notice) to produce it: a copy thereof will be permitted to be given in evidence, on its being proved to be a true copy. And if the party has no copy, he may produce an abſtract, nay even give parol evidence of the contents; becauſe in ſuch caſe it may be impoſſible to give better evidence. In *civil* cauſes, the court will ſometimes oblige parties to produce evidence which may prove againſt themſelves; or leave the refuſal to do it (after proper notice) as a ſtrong preſumption, to the jury. The court will do it, in many caſes, under particular circumſtances, by rule before the trial; eſpecially, if the party from whom the production is * wanted applies for a favour. But in a *criminal* or *penal*

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penal cauſe, the defendant is never forced to produce any evidence; though he ſhould hold it in his hands in court. *Theory of Evid.* 54. *Burrow. Mansf.* 2489.

Where an original note of hand is loſt, and a copy of it is offered in evidence to ſerve any particular purpoſe in a cauſe; ſufficient probability muſt be ſhewed to ſatisfy the court, that the original note was genuine, before the copy will be allowed to be read. 1 *Atk.* 446.

But by lord *Hardwicke*, Ap. 16, 1740. On exceptions to a maſter's report. Where a rent charge is granted by deed, and the deed happens to be loſt, the plaintiff cannot read a copy in evidence at law, but muſt either ſet up a preſcriptive title to the rent, from a conſtant and uninterrupted payment, or he muſt bring his bill in equity, to be relieved againſt the accident of the original's being loſt. And the ſame rule holds in caſe of a bond; for though an hundred witneſſes could prove the ſubſtance of it, yet it is not ſufficient at law, for the plaintiff muſt declare upon it, ſetting forth that he produceth it in court. 2 *Atk.* 61.

Writing with the ſeal torn off.

9. An indenture to guide the uſes of a common recovery, was offered in evidence, but the ſeals were torn off; yet it being proved to have been done by a little boy, it was allowed to be read. *Palm.* 402.

To prove the taking of an oath, in the act of uniformity, a certificate was produced that had only a ſmall piece of wax upon it. By *Twiſden*; if it were ſealed, tho' the ſeal was broken off, yet it may be read, as we read recoveries after the ſeal broken off; and he ſaid, he had ſeen an adminiſtration given in evidence after the ſeal broken off, and ſo wills and deeds. 11 *Mod.* 11. M. 21 C. 2. *Clerk* and *Heath.*

Letters patent.

10. If upon collateral iſſue, it is to be proved, that ſuch a one was juſtice of the peace, baronet, or the like; common reputation is ſufficient proof, without ſhewing the commiſſion, or letters patent of the creation. *Tr. per pais.* 347.

Copy of a will or of letters of adminiſtration.

11. The copy of the probate of a will is good evidence, where the will itſelf is of chattels; for there the probate is an original, taken by authority, and of a publick nature: otherwiſe, where the will is of things in the realty; becauſe in ſuch caſe the eccleſiaſtical courts have no authority to take probates; therefore ſuch probate is but a copy, and the copy of it is no more than the copy of a copy. 3 *Salk.* 154.

* The eccleſiaſtical court never grants an exemplification of letters of adminiſtration, but only a certificate that adminiſtration was granted; therefore where a leſſee pleads an aſſignment of a term from an adminiſtrator, ſuch certificate is good evidence. So would

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would the book of the eccleſiaſtical court, wherein was entred the order for granting adminiſtration. So would the copy of the probate of a will, be evidence of ſuch an one being an executor, but a copy of the will would not be evidence of it. *Kempton* and *Croſs*, E. 8 G. 2. *Buller's Law of Niſi prius*, 246.

12. So the copy of the court roll of a manor, is good evidence; as alſo the copy of a church-regiſter, the copies of town-books, and the like; for where the original itſelf is good evidence, the immediate copy thereof is alſo good evidence. *Skin.* 584. L. *Raym.* 154. *Other copies.*

And generally, wherever an original is of a publick nature, and would be evidence if produced, an immediate ſworn copy thereof will be evidence, as a copy of a bargain and ſale, of a deed inrolled, and the like; but where an original is of a private nature, a copy is not evidence, unleſs the original is loſt or deſtroyed. 3 *Salk.* 154. H. 8 W. *Lynch* and *Clarke*.

On a warrant to a conſtable to diſtrain goods by virtue of an act of parliament; the conſtable makes diſtreſs, and returns the overplus to the offender, but keeps the warrant. Reſolved, that a copy of the warrant in this caſe will be good evidence. 6 *Mod.* 83. M. 2 An. *Morley* and *Staker*.

So a copy of a conviction for killing game, was agreed to be evidence in bar of an action brought for the ſame offence. T. 5 G. 3. *K.* and *Midlam*. Burr. Manſf. 1720.

13. An inquiſition *poſt mortem* is evidence, but not concluſive. 2 T. *Jones*. 224. M. 34 G. 2. Earl of *Thanet* v. *Foſter*. *Inquiſition poſt mortem.*

14. The entry of the names and titles of perſons in a church-book either for marriages or births is evidence, but not concluſive evidence of the marriage or birth of any perſons, unleſs the identity of the perſon (by ſuch entries intended) is fully proved, and alſo ſtrengthened with circumſtances, as cohabitation, the allowance of the parties themſelves, and the like. 12 *Vin.* 89. *Pariſh regiſter.*

15. Rolls or ancient books in the heralds office are evidence to prove a pedigree; but an extract of a pedigree, proved to be taken out of records, ſhall not; becauſe ſuch extract is not the beſt evidence in the nature of * the thing, as a copy of ſuch records might be had. *Theory of Evid.* 45. 3 *Black.* 105. *Heralds books.* *540

16. An old terrier, or ſurvey of a manor, whether eccleſiaſtical or temporal, may be given in evidence; for there can be no other way of aſcertaining the old tenures or boundaries. *Theory of Evid.* 44. *Bounder roll.*

17. A terrier of glebe is not evidence for the parſon, unleſs ſigned by the churchwardens, as well as the parſon; nor then neither, if they be of his nomination: and tho' it be ſigned by them, yet it ſeems to *Terriers.*

deſerve

deſerve very little credit, unleſs it is likewiſe ſigned by the ſubſtantial inhabitants. But in all caſes, it is certainly ſtrong evidence againſt the parſon. *Theory of Evid.* 45.

Indorſement of intereſt on a bond.

18. M. 11 G. *Serle* and lord *Barrington.* The indorſement on a bond by the obligee, of payment of intereſt, was allowed to be given in evidence by his adminiſtrator, to take off the preſumption from the length of time. L. *Raym.*

1371.

Shop book.

19. By the 7 *J.* c. 12. No tradeſman nor handicraft-man ſhall be allowed to give his ſhop-book in evidence, on an action for money due for wares delivered, or for work done, above one year before the action brought. But this not to extend to any trading between merchant and merchant, merchant and tradeſman, or between tradeſman and tradeſman, for any thing directly falling within the compaſs of their mutual trades and merchandize.

In the caſe of *Pitman* and *Maddox*, 11 W. A ſhop-book was allowed for evidence, it being proved that the ſervant that writ the book was dead, and this was his hand, and he accuſtomed to make the entries, and no proof was required of the delivery of the goods; and *Holt* Ch. J. ſaid it was as good evidence as the proof of a witneſs's hand to an obligation; and he held, that tho' the ſtatute of the 7 *J.* ſays, a ſhop-book ſhall not be evidence after the year, yet it is not of itſelf evidence within the year. 2 *Salk.* 690.

Book of accounts.

20. A man's book of accounts is no evidence for the owner of the book, but for the adverſe party; for his book cannot be of better credit than his oath, which would not ſerve in his own caſe. *Tr. per pais.* 348.

Private books of entries.

21. In the caſe of the *Queen* and *Mead*, the defendant, and eight others, were incorporated under an act made 39 El. by the name of the ſurveyors of the highways at *Aileſbury* in the county of *Bucks*, and were truſtees of a charity called *B dford*'s gift. An information was preferred againſt the defendant, for executing this office, being an office of truſt, without having taken the oaths, * contrary to the 25 C. 2. c. 2. To which
41 he pleaded not guilty. And now it was moved for a rule, that the proſecutor might have two books produced, which theſe ſurveyors kept, in which they entred their elections, and alſo their receipts and diſburſements; and that he might take copies of what he thought neceſſary, and that the books might be produced at the next aſſizes at the trial. But it was denied by the court; becauſe they are perfectly of a private nature, and it would be to make a man to produce evidence againſt himſelf in a criminal proſecution. L. *Raym.* 927.

22. A copy of an inſcription on a grave-ſtone, hath been allowed to be given in evidence. *Inſcription on a grave ſtone.*

23. The examination of an almanack, that ſuch a day of the month was *Sunday*, was ruled to be ſufficient; and that a trial of this by a jury is not neceſſary, altho' it is a matter of fact. *Cro. El.* 227. *Almanack.*

And the reaſon why the kalendar in an almanack is allowed as evidence ſeemeth to be, becauſe the ſaid kalendar is part of a book of common prayer, which is eſtabliſhed by act of parliament.

24. An almanack wherein the father had writ the day of the nativity of his ſon, was allowed as evidence to prove the nonage of his ſon. *Raym.* 84. *Father's entry of the child's birth.*

25. *Camden's Britannia* was offered in evidence, to prove a particular cuſtom, but refuſed; for the court held, that a general hiſtory might be given in evidence to prove a matter relating to the kingdom in general, becauſe the nature of the thing requires it; but not to prove a particular right or cuſtom: So in the caſe of St. *Katharine*'s hoſpital, *Hale* Ch. J. allowed a chronicle to be evidence of a particular point of hiſtory in *Edward* the third's time: So a year book may be evidence to prove the courſe of the court. And in this caſe it was admitted, that heralds books are good evidence as to pedigrees, and pariſh regiſters as to births and marriages, upon the nature of the thing. But in the exchequer, the queſtion being whether the *Abbey de Fontibus* was an inferior abbey or not, *Dugdale's Monaſticon* was refuſed for evidence, becauſe the original records might be had in the augmentation office. 1 *Salk.* 281. 7 W. *Stainer* and the *Burgeſſes of Droitwich.* *General hiſtory.*

So in the caſe of *Cockman* and *Mather*, E. 13 G. On a trial at bar, concerning the right of viſiting univerſity college in *Oxford*, one of the iſſues was, whether king *Alfred* was founder. And the counſel for the plaintiff would have given in evidence ſeveral hiſtorians as to this point. But the chief juſtice declared, that ſuch evidence * is never admitted, unleſs in proof of a point concerning the publick government. And the evidence was not allowed. *Barnard.* 14. *542

26. It ſeems to have been generally holden, ſince the reverſal of the attainder of *Algernon Sidney*, that ſimilitude of hands is not evidence in any criminal caſe, whether capital or not capital. 2 *Haw.* 431. L. *Raym.* 39. *Similitude of hands.*

And, generally, it is ſaid, that ſimilitude of hands is no evidence; but ſaying that he was well acquainted with his writing, and knew it to be the party's, is evidence. 12 *Viner.* 204.

And in general caſes, the witneſs ſhould have gained his knowledge from having ſeen the party write; but under ſome circumſtances that is not neceſſary; as where the hand-writing to be

proved is of a perſon reſiding abroad, one who has frequently received letters from him in a courſe of correſpondence, would be admitted to prove it, tho' he had never ſeen him write. So where the antiquity of the writing makes it impoſſible for any living witneſs to ſwear he ever ſaw the party write; as where a parſon's book was produced to prove a modus, the parſon having been long dead, a witneſs who had examined the pariſh books, in which was the ſame perſon's name, was permitted to ſwear to the ſimilitude of the hand-writing, for it was the beſt evidence in the nature of the thing, for the pariſh books were not in the plaintiff's power to produce. *Theory of Evid.* 25, 26.

So in the caſe of *Gould* and *Jones*, T. 2 G. 3. On the trial of an iſſue out of chancery, before lord *Mansfield* at the ſittings in *Middleſex*, where it was diſputed, whether the name of one *William Jones*, ſubſcribed to a declaration of truſt, was genuine; and, to prove the hand-writing forged, a witneſs was produced, who had frequently correſponded with *Jones*, but had never ſeen him write: Lord *Mansfield*, upon debate, held him to be a good evidence, and his teſtimony accordingly was admitted. *Black. Rep.* 384.

III. Of the evidence of witneſſes.

Confeſſion. 1. It ſeems that the confeſſion of the defendant whether taken on an examination before juſtices of the peace, in purſuance of the 1 & 2 P. & M. c. 13. or 2 & 3 P. & M. c. 10. upon a bailment or commitment for felony, or taken by the common law upon an examination for other crimes not within theſe ſtatutes, or in diſcourſe with * private perſons, hath always been allowed to be given in evidence againſt the party confeſſing, but not againſt others. 2 *Haw.* 429.

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Witneſs of kin to the party. 2. It is to be obſerved, that there be many circumſtances that diſable a juror, that are not ſufficient exceptions againſt a witneſs: Thus the exception of kindred is a good cauſe of challenge againſt a juror, but not againſt a witneſs; therefore the father may be a competent witneſs for or againſt his ſon, or the ſon for or againſt his father. Theſe and the like exceptions may be to the credit or credibility of the witneſs, but are not exceptions againſt his competency. 2 H. H. 276.

For, that I may obſerve it once for all, the exceptions to a witneſs are of two kinds. 1. Exceptions to the credit of the witneſs, which do not all diſable him from being ſworn, but yet may blemiſh the credibility of his teſtimony; and in ſuch caſe the witneſs is to be allowed, but the credit of his teſtimony is left to the jury. 2. Exceptions to the competency of the witneſs, which do exclude him

him from giving his teſtimony, and of theſe exceptions the court is the judge. 2 H. H. 276, 277.

3. It ſeems agreed, that an attainder, judgment, or conviction of treaſon, felony, piracy, præmunire, perjury, or forgery on 5 El. and alſo a judgment in attaint for giving a falſe verdict, or in conſpiracy at the ſuit of the king, and alſo judgment for any heinous crime to ſtand on the pillory, or to be whipped or branded, are good cauſes of exception againſt a witneſs, while they continue in force. 2 Haw. 432. Theory of Evid. 107. *Witneſs infamous.*

In the caſe of *Pendock* and *Mackender*, H. 28 G. 2. the queſtion was, whether a perſon convicted and whipped for petit larceny ſhall be allowed to be a witneſs. And the court were clearly of opinion that he ſhall not; and laid it down as a rule, that it is the crime that creates the infamy, and not the puniſhment for it. Petit larceny is felony; and there is no caſe where a perſon convicted thereof was ever admitted to be a witneſs. 2 Wilſon 18.

But it is agreed, that no ſuch conviction or judgment can be made uſe of to this purpoſe, unleſs the record be actually produced in court. 2 Haw. 433.

Alſo, it is a general rule, that a witneſs ſhall not be aſked any queſtion, the anſwering to which might oblige him to accuſe himſelf of a crime; and that his credit is to be impeached only by general accounts of his character and reputation, and not be proofs of particular crimes, whereof he never was convicted. 2 Haw. 433.

* And a man ſhall not be permitted to ſwear, that he was ſuborned and perjured. St. Tr. V. 3. 427. * 544

And lord *Coke* ſays, a witneſs alledging his own infamy or turpitude, is not to be heard. 4 Inſt. 279.

Thus a wife was diſallowed to be a witneſs to prove her huſband had no acceſs to her in a caſe of baſtardy. Seſſ. Caſes, V. 2. 175. *K.* and *Reading*, M. 8 G. 2.

It ſeems clear at this day, that outlawry in a perſonal action is not a good exception againſt a witneſs, as it is againſt a juror. 2 Haw. 433.

A perſon convicted of felony, who is admitted to his clergy, and burnt in the hand, is thereby re-enabled to be a witneſs. 2 Haw. 433.

And it ſeems agreed, that the king's pardon of treaſon, or felony, after a conviction or attainder, reſtores the party to his credit. 2 Haw. 433.

4. It ſeems agreed to be a good exception, that a witneſs is an infidel; that is, as it ſeemeth, that he believes neither the Old nor New Teſtament to be the word of God, on one of which our laws require the oath ſhould be adminiſtered. 2 Haw. 434. But Mahometans and Pagans have been admitted to be ſworn in their own country way. *Witneſs an infidel.*

Witneſs wanting diſcretion.

5. Want of diſcretion is a good exception againſt a witneſs; on which account alone it ſeems, that an infant may be excepted againſt. 2 Haw. 434.

But if an infant be of the age of 14 years, he is as to this purpoſe of the age of diſcretion, to be ſworn as a witneſs; but if under that age, yet if it appear that he hath a competent diſcretion, he may be ſworn. 2 H. H. 278.

And in many caſes an infant of tender years may be examined, where the exigence of the caſe requires it; which poſſibly, being fortified with concurrent evidences, may be of ſome weight; eſpecially in caſes of rape, buggery, and ſuch crimes as are practiſed upon children. 2 H. H. 279, 284.

But in no caſe ſhall an infant be admitted as evidence, without oath. Str. 700. 1 Atk. 29.

Witneſs intereſted.

6. It ſeems an unconteſted rule in all caſes, that it is a good exception againſt a witneſs that he is either to be a gainer or loſer by the event of the cauſe, whether ſuch advantage be direct and immediate, or conſequential only. 2 Haw. 433.

Thus in an information upon the ſtatute of uſury, the party to the uſurious contract ſhall not be admitted to be a witneſs againſt the uſurer, for in effect he ſhould be witneſs in his own cauſe, and ſhould avoid his own bonds * and aſſurances, and diſcharge himſelf of the money borrowed. 1 Inſt. 6.

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Thus alſo an attorney ought not to be examined againſt his client, becauſe he is obliged to keep his ſecrets: but of his own knowledge before retainer, he may be examined as a witneſs, if ſerved with a ſubpœna. *Wood.* b. 4 c. 4.

But upon an indictment for battery, or the like, the party grieved may be a witneſs againſt the defendant, becauſe the proſecution is at the ſuit of the king. *Wood.* b. 4. c. 5.

And in many criminal caſes, from the neceſſity of the thing, intereſted perſons are allowed as witneſſes. As where the owner proſecutes an indictment of felony for ſtolen goods, he is concerned in intereſt; for he will be intitled to reſtitution: and yet his evidence is admitted. So in removing an indictment by certiorari from the ſeſſions to the king's bench; tho' the proſecutor in that caſe, if the defendant be convicted, is intitled to his coſts, yet he is allowed as a witneſs. So where a man, in caſe of conviction of the offender for a robbery, will be intitled to a 40l reward; yet his evidence ſhall be received. And by *Parker* chief juſtice: As to the caſes where a 40l reward is given, they admit of this anſwer; that the intention of thoſe acts would be quite defeated, if ſo be the reward ſhould take off the evidence. The ſame anſwer may ſerve to the caſes put upon an indictment of felony for ſtolen goods; and where the indictment is removed by certiorari: for none in the firſt caſe but the owner can prove the property of the goods; and in the ſecond, if the giving of coſts ſhould take off the evidence of the proſecutor, the act of parliament deſigned to diſcountenance the removing of ſuits by certio-

rari,

rari, would give the greateſt encouragement of them that is poſſible. 10 Mod. 193. M. 12 An. Q. and *Muſcot.*

Alſo it ſeems agreed, that it is no good exception againſt a witneſs, that he has a maintenance from the king; for every one may maintain his own witneſſes. 2 Haw. 434.

Thus alſo, one commoner may be a witneſs for another claiming common, becauſe in effect it charges himſelf; that is to ſay, he admits another to have common with himſelf. But if the preſcription be, that all the inhabitants of ſuch a place ought to have common there, one of the inhabitants cannot be a witneſs, to prove that another of the ſaid inhabitants ought to have common there, * becauſe * 546
in effect he would ſwear to give himſelf right of common there. L. *Raym.* 731.

A truſtee may be a witneſs, if he hath releaſed his truſt; but not if he hath conveyed it over. Sid. 315. M. 18 C. 2. *Stevens* and *Gerrard.*

An heir at law may be a witneſs concerning the title to the land, but the remainder-man cannot, for he hath a preſent intereſt, but the heirſhip is a mere contingency. 1 Salk. 283. M. 10 W. *Smith* and *Blackham.*

In evidence to a jury at bar, a ſpecial iſſue by rule of court was directed to try the cuſtom of lady *Percie*'s manor of *Weſtward* in *Cumberland*, whether fines on the tenants on their lord's death, be due to the heirs or ſucceſſors of the lord, during his minority; the defendant excepted to the ſteward, becauſe he had a fee on admiſſion, but it was not allowed, and he was ſworn. 3 Keb. 90.

A witneſs laying a wager in the cauſe, is no hindrance to his being a witneſs; for the other has an intereſt in his evidence which he cannot deprive him of. Fareſ. 31. Str. 652.

If a perſon *apprehends* himſelf to be intereſted, tho' in ſtrictneſs of law he is not, yet he ought not to be ſworn: as where the witneſs for the plaintiff apprehended that if the plaintiff ſhould recover, he would remit a claim of ſome money which he (the plaintiff) had upon this witneſs; but if he ſhould not recover, he would not remit it; although in ſtrictneſs of law, his recovering or not recovering in that caſe would not alter the claim: or as in caſe where the witneſs owned himſelf to be under an honorary, though not under a binding engagement, to pay the coſts. Str. 129.

If a man hath been examined on interrogatories, being at that time diſintereſted, and afterwards becomes intereſted, his depoſition may be given in evidence; becauſe his evidence muſt be taken as it ſtood at the time of his examination. So if a witneſs to a bond becomes afterwards repreſentative of the obligee, his hand muſt be proved in like manner as if he were dead. 2 Atk. 615. 2 Vezey. 44.

7. It ſeems agreed, that the huſband and wife being as one and the ſame perſon in affection and intereſt, can no more give evidence for one another, in any caſe whatſoever, than for themſelves; *Huſband and wife.*

and

and that regularly the one ſhall not be admitted to give evidence *againſt* the other, nor the examination of the one be made uſe of againſt the other, by reaſon of the implacable diſſenſion which might be cauſed by it, and the great danger of perjury from taking * the
*547 oaths of perſons under ſo great a bias, and the extreme hardſhip of the caſe. Yet ſome exceptions have been allowed in caſes of evident neceſſity; as in the lord *Audley*'s caſe, who held his wife, while his ſervant by his command raviſhed her; or where a man is indicted for a forcible marriage on the ſtatute of the 3 H. 7. or where either a huſband or wife have cauſe to demand ſureties of the peace againſt the other. 2 Haw. 431, 432.

Judge or Juror being a witneſs.

8. It ſeems agreed, that it is no exception againſt a perſon's giving evidence either for or againſt a priſoner, that he is one of the judges or jurors who are to try him. 2 Haw. 432.

But where a juror is called upon to give his evidence, he ought to give it upon oath openly in court, and not be examined privately by his companions. Bac. Abr. Evid A. 2.

Witneſs being an accomplice.

9. It hath been long ſettled, that it is no exception againſt a witneſs, that he hath confeſſed himſelf guilty of the ſame crime, if he hath not been indicted for it; for if no accomplices were to be admitted as witneſſes, it would be generally impoſſible to find evidence to convict the greateſt offenders. 2 Haw. 432.

Alſo it hath been often ruled, that accomplices who are indicted, are good witneſſes for the king, until they be convicted. 2 Haw. 432.

Alſo it hath often been adjudged, that ſuch of the defendants in an information, againſt whom no evidence is given, may be witneſſes for the others. 2 Haw. 432.

It hath been alſo adjudged, that where three perſons are ſued in three ſeveral actions on the ſtatute for a ſuppoſed perjury in their evidence concerning the ſame thing, they may be good witneſſes in ſuch actions for one another. 2 Haw. 432.

Witneſs an alien or bondman.

10. It ſeems agreed, that it is no good exception againſt a witneſs, that he is an alien, or villein, or bondman. 2 Haw. 434.

Witneſs blind.

11. There were two witneſſes to a deed, and one of them was blind. It was ruled by *Holt* chief juſtice, that ſuch deed might be proved by the other witneſs, and read; or might be proved, without proving that this blind witneſs is dead; or without having him at the trial, proving only his hand. L. Raym. 734. Wood *and* Drury.

Witneſs over ſea.

12. If a witneſs is beyond the ſea, it is uſual to prove his hand, and that he is beyond the ſea. 12 Viner. 224.

Witneſs become inſane.

13. There were two witneſſes to a bond; one in *Africa*; and the other in Bedlam, mad: On an order to prove an exhibit *viva voce* in chancery, a witneſs

witneſs proved theſe facts, * and their hands to the bond as if dead. * 548
T. 5 & 6 G. 2. 12 Viner. 224.

14. If a witneſs to a deed is dead, it is not ſuf- *Witneſs dead.*
ficient to prove his hand-writing, but it muſt be proved alſo that he is dead. 2 Atk. 48.

And where a perſon has lived abroad for ſome years, after atteſting a deed, there muſt be ſtrict proof of his death: Otherwiſe it is, where the witneſs has lived conſtantly in *England*, from the time of ſubſcribing his name to the day of his death; for in that caſe, a ſlight evidence of his death is ſufficient, eſpecially where the perſon who proves his hand knew him intimately, who ſwears that he believes him dead. Id.

But where the witneſs is dead, it is ſufficient to prove the witneſs's hand, without proving the hand of the party. 12 Viner. 224.

The ſayings of a dead man are not to be given in evidence to prove a particular fact; they are only to be admitted in proof of general uſages and cuſtoms; but as for a particular fact, lying in the knowledge of a particular perſon, by his death the evidence is loſt. St. Tr. V. 5. 456.

And it hath been agreed, that the evidence given by a witneſs at one trial, cannot in the ordinary courſe of juſtice be made uſe againſt a defendant, on the death of ſuch witneſs at another trial. 2 Haw. 430.

In the caſe of murder, what the deceaſed declared after the wound given, may be given in evidence. 12 Viner. 118.

But where ſuch declaration is reduced into writing, the writing itſelf muſt be produced, and not evidence thereof given *vica voce*. Id. 119.

15. It is a general rule that hearſay is no evi- *Hearſay.*
dence; for no evidence is to be admitted but what is upon oath; for if the firſt ſpeech was without oath, another oath that there was ſuch ſpeech, makes it no more than a bare ſpeaking, and ſo of no value in a court of juſtice; and beſides, the adverſe party had no opportunity of a croſs examination; and if the witneſs is living, what he has been heard to ſay is not the beſt evidence that the nature of the thing will admit. But though hearſay ought not to be allowed as direct evidence, yet it may be allowed in corroboration of a witneſs's teſtimony, to ſhew that he affirmed the ſame thing before on other occaſions, and that he is ſtill conſtant to himſelf. So where the iſſue is on the legitimacy of a perſon, it ſeems the practice to admit evidence of what the parents have been heard to ſay, either as to their being or not being married, for the * preſumption ariſing from the cohabitation is either ſtrengthened or deſtroyed by ſuch declarations, which altho' not to be given * 549
in evidence directly, yet they may be aſſigned by the witneſs as a reaſon for his belief one way or other. So hearſay is good evidence to prove who was a man's grandfather, when he married, what children he had, and the like, of which it is not reaſonable to preſume that

there

there is better evidence. So to prove that a man's father or other kinſman beyond the ſea is dead, the common reputation and belief of it in the family gives credit to ſuch evidence; and for a ſtranger it would be good evidence, if a perſon ſwore that a brother or other near relation had told him ſo, which relation is dead. So in queſtions of preſcription, it is allowable to give hearſay evidence, in order to prove general reputation: and where the iſſue was of a right to a way over the plaintiff's cloſe, the defendants were admitted to give evidence of a converſation between perſons not intereſted, then dead, wherein the right to the way was agreed. Theory of Evid. 111, 112.

So in eſtabliſhing a title to an eſtate upon a pedigree, evidence that a man has not been heard of for many years, is ſufficient evidence *prima facie* to prove him dead without iſſue, ſo as to put the oppoſite party upon proof that he ſtill exiſts. Many perſons go to the Eaſt and Weſt Indies, and are never heard of more. In the mean time what is done upon ſuch a trial is no injury to the man or his iſſue, if he or they ſhall afterwards appear and claim the eſtate. Black. Rep. 404.

IV. Of proceſs to cauſe witneſſes to appear.

Two ways of cauſing witneſſes to appear.

1. The compulſory means to bring in witneſſes, are of two kinds. 1. By proceſs of *ſubpœna* (A) iſſued in the king's name, by the juſtices, or others, where the trial is to be. 2. Which is the more ordinary and more effectual means (in criminal caſes), the juſtices that take the examination of the perſon accuſed, and the information of the witneſſes, may at that time, or at any time after, and before the trial, bind over (B) the witneſſes to appear at the ſeſſions, and in caſe of their refuſal either to come, or to be bound over, may commit them for their contempt in ſuch refuſal. 2 *H. H.* 282.

Charges of witneſſes.

2. By the 27 *G.* 2. *c.* 3. When any poor perſon ſhall appear on recognizance in any court to give evidence againſt another accuſed of grand or petit larceny or other felony, the court may, at the prayer, and on the
*550 oath of * ſuch perſon, and on conſideration of his circumſtances, order the treaſurer to pay him ſuch ſum as they ſhall think reaſonable for his time, trouble, and expence; which order the proper officer ſhall make out for the fee of 6d; except in *Middleſex*, where the ſame ſhall be paid by the overſeers of the poor where the perſon was apprehended.

And by the 18 *G.* 3. *c.* 19. The court where any perſon ſhall appear on recognizance or *ſubpœna* to give evidence as to any grand or petit larceny or other felony, whether any bill of indictment be preferred or not, may order the treaſurer to pay to him ſuch ſum as they ſhall think reaſonable, not exceeding the expences he was *bona fide* put unto, making alſo, if he ſhall appear to be in poor circumſtances,

a reaſonable

a reaſonable allowance for his trouble and loſs of time; which order the clerk of aſſize or of the peace reſpectively ſhall forthwith make out and deliver to him, on being paid for the ſame 6d and no more; and the treaſurer upon ſight of the order ſhall forthwith pay the ſame, *ſ.* 8.——And the juſtices in ſeſſions from time to time may lay down or alter ſuch rules and regulations concerning any coſts or charges to be allowed to any perſon by virtue of this act, as to them ſhall ſeem juſt: which rules and regulations, having received the approbation and ſignature of one or more of the judges of aſſize, ſhall be binding on all perſons whatſoever. *ſ.* 9.

Where a witneſs is a priſoner in execution.

3. Where a witneſs is a priſoner in execution for debt, he muſt be brought up by *habeas corpus ad teſtificandum*, to give his evidence. *St. Tr. V.* 2. 580. *V.* 4. 37.

Witneſs how far privileged againſt an arreſt.

4. One was ſubpœnaed *ad teſtificandum*, and prayed a privilege from being arreſted, which was granted; and by the court, it will ſuperſede an arreſt upon *meſne* proceſs, but not upon an execution; yet the ſheriff in that caſe may be committed for his contempt *Nevil*'s caſe, 15 *C.* 2. *Tr. per p.* 310.

Penalty of a witneſs not appearing.

5. By the 5 *El. c.* 9. *ſ.* 12. If any perſon upon whom any proceſs out of any of the courts of record within this realm ſhall be ſerved, to teſtify or depoſe concerning any matter depending therein, and having tendered unto him, according to his countenance or calling, ſuch reaſonable ſum for his coſts and charges, as (having regard to the diſtance of the places) is neceſſary to be allowed in that behalf, do not appear according to the tenor of the proceſs, having not a lawful and reaſonable impediment; he ſhall forfeit 10*l.* and ſhall yield ſuch further recompence to the party grieved, as to the judge of the court, out of which the proceſs was awarded, ſhall ſeem meet, according to the loſs that the party which procured the proceſs ſhall ſuſtain; * to be recovered by the party grieved, in any court of record. * 551

In the caſe of *Wyat* and *Winkford*, 2 G. 2. A motion was made for an attachment againſt a perſon for not attending at the aſſizes to give his evidence, being ſubpœnaed, and having received one guinea for his charges, and being promiſed to have one guinea a day while there, and his charges paid. And a rule was made to ſhew cauſe. And afterwards cauſe was ſhewed, that an attachment ought not to go, but the party injured had his action upon the ſtatute of Eliz. but the court thought it was a good foundation for an attachment, the diſobedience to the ſubpœna being a contempt of the court; and though an action might be brought on the ſtatute, yet that was a more dilatory method, and more difficult to proceed in, which encouraged witneſſes not attending frequently upon trials, at which they were ſubpœnaed to appear and give evidence. And therefore the rule was made abſolute. L. Raym. 1529.

In the caſe of *Small* and *Whitmill*, M. 10 G. 2. It was moved for an attachment againſt one *Wakefield*, for not attending to give

evidence, being ſerved with a ſubpœna. The ticket and ſubpœna were not ſworn to have been ſerved perſonally; but delivered to a ſervant at the witneſs's houſe, who carried it up to his maſter, and brought down word, that he delivered it to his maſter, who ſaid he would attend. By Lord *Hardwicke* Ch. J. This way of proceeding by attachment is a new method. I do not know that it has been determined, that ſerving a ſubpœna on a ſervant would be a ſufficient ſervice to maintain an *action*; but however, to be ſure, it is not a ſufficient ground for an *attachment*. And *Lee* J. ſaid, it hath been ſolemn determined, that you muſt not only have an affidavit of tendring the ſhilling, but likewiſe of a tender of reaſonable charges, to ground an attachment. And the attachment was denied. Caſ. Hard. 313. Str. 1054.

E. 14 G. 2. *Chapman* and *Poynton*. A witneſs was ſerved with a ſubpœna at *Cheſter*, to attend the ſittings at *Guildhall*, and two guineas were tendred by the perſon who ſerved it, and being objected to as too little, he declared he would give no more. The witneſs not coming up, an attachment was moved for; but on ſhewing cauſe was diſcharged; the court ſaying it was too little, and that the witneſs is not obliged to truſt to the court's allowing him more when he comes to the book; for perhaps the party may not call him, and it may be difficult for him to get home again: that this way of puniſhing as for a contempt * was new, and practiſed only in this court: the common pleas not doing it to this day, but leaving the party to his remedy on the 5 El. c. 9. and therefore they would not enter into any nice calculations of the expence, but confined their inquiry to the queſtion, whether the non-attendance was thro' obſtinacy or not. Str. 1150.

*552

M. 22 G. 2. *Bowles* and *Johnſon*. It was moved for an attachment againſt one *Yerburgh*, for not giving evidence at the aſſizes. He was ſubpœnaed, but had no offer to have his expences born; but came to the aſſizes, where money was tendred to him for that purpoſe, but he refuſed to be ſworn. By *Lee* chief juſtice: Attachments are a new practice. I remember the firſt motion for them. It was then agreed, that the ſame reſtrictions ſhould be uſed in attachments as in actions on the 5 Eliz. one of which is, that a tender of expences ſhould be made at the ſervice of the ſubpœna. In this caſe, *Yerburgh* has not been ſubpœnaed regularly, ſo as to ſubject him to the 5 Eliz. In order to be ſubject to an attachment, you muſt ſhew him guilty of a contempt of this court. By *Wright* juſtice. A perſon not properly ſubpœnaed is to be looked upon only as a ſtander-by; and it is no contempt of the court of *Niſi Prius*, for a ſtander-by to refuſe to be examined, much leſs is it a contempt of this court. And the attachment was denied. Black. Rep. 36.

And, by the court, in the caſe of *Hammond* and *Stewart*, H. 8 G. the witneſſes ought to have a reaſonable time to put their affairs in order, that their attendance upon the court may be as little prejudice to themſelves as poſſible. Str. 510.

In

In criminal caſes if a witneſs hath been bound over, and do not appear, he ſhall forfeit his recognizance.

V. Of the manner of giving evidence.

1. He who affirms the matter in iſſue, whether plaintiff or defendant, ought to begin to give evidence. *Lit.* 36. *Which party ſhall begin the evidence.*

2. The evidence both for and againſt a priſoner ought to be upon oath. *Evidence to be upon oath.*

And if a peer is produced as a witneſs, he ought to be ſworn. 3 Keb. 61.

Lord *Preſton* was committed by the court of quarter ſeſſions, for refuſing to be ſworn to give evidence to the grand jury on an indictment of high treaſon; and on his being brought by *habeas corpus* into the king's bench, *Holt* Ch. J. ſaid, it was a great contempt, and that had he been there, * he would have fined him, and committed him till he paid the fine; but being otherwiſe, he was bailed. 1 Salk. 278. *553

But a quaker's affirmation in all caſes not being criminal, ſhall be allowed as evidence, without an oath; but in criminal caſes his affirmation ſhall not be allowed. 7 & 8 W. c. 34.

3. It is no ſatisfaction for a witneſs to ſay, that he thinks or perſuades himſelf; and this for two reaſons; by *Coke* chief juſtice: 1. Becauſe the judge is to give abſolute ſentence, and ought to have more ground than thinking. 2. Becauſe judges, as judges, are always to give judgment *ſecundum allegata & probata*, notwithſtanding that private perſons think otherwiſe. Dyer, 53. *Muſt be poſitive.*

4. The court may indulge a priſoner in examining the witneſſes apart, but he cannot demand it of right. St. Tr. V. 4. 9. *Witneſſes may be examined apart.*

5. In caſes of life, no evidence is to be given againſt a priſoner, but in his preſence. 2 Haw. 428. *Evidence to be given in the priſoner's preſence.*

H. 26 G. 3. *K.* v. *Thomas Spencer Crowther.* A conviction for killing game was quaſhed, becauſe the ſame ſet forth only, that the depoſition of *Edward Tye* the witneſs, which had before been ſworn to before the juſtice, was again read over to him in the preſence and hearing of the ſaid *T. S. Crowther*, and that the ſaid *Edward Tye again affirmed his ſaid depoſition to be true in the preſence and hearing of the ſaid T. S. Crowther.*—By the court: The witneſs ought to have been reſworn in the preſence of the defendant. Caſ. by Durnf. and Eaſt. 125.

Witneſſes cannot teſtify a negative.

6. In every iſſue the affirmative is to be proved. A negative cannot regularly be proved; and therefore it is ſufficient to deny what is affirmed, until it be proved; but when the affirmative is proved, the other ſide may conteſt it with oppoſite proofs; for this is not properly the proof of a negative, but the proof of ſome propoſition totally inconſiſtent with what is affirmed: as if the defendant be charged with a treſpaſs, he need only make a general denial of the fact, and if the fact be proved, then he may prove a propoſition inconſiſtent with the charge, as that he was at another place at the time, or the like. *Theory of Evid.* 116, 117.

But to this rule there is an exception of ſuch caſes, where the law preſumes the affirmative contained in the iſſue. Therefore, in an information againſt lord *Hallifax* for refuſing to deliver up the rolls of the auditor of the exchequer: the court of exchequer put the plaintiff upon proving the negative, namely, that he did not de-
*554 liver * them; for a perſon ſhall be preſumed duly to execute his office, till the contrary appear. *id.* 117.

A man ſhall not diſprove his own witneſſes.

7. A priſoner may not call witneſſes to diſprove what his own witneſſes have ſworn. *St. Tr. V.* 2. 764, 792.

Whether a witneſs may read his evidence.

8. A witneſs ſhall not be permitted to read his evidence, but he may look upon his notes to refreſh his memory. *St. Tr. V.* 4. 45.

When he may be croſs examined.

9. A witneſs ſhall not be croſs examined, till he has gone through the evidence for the party on whoſe ſide he was produced. *St. Tr. V.* 2. 792.

Variance.

10. It hath been admitted, that in order to ſhew a variance in the evidence, a depoſition taken by a witneſs before a juſtice of the peace, may at the priſoner's deſire be read at the trial, in order to take off the credit of the witneſs, by ſhewing a variance between ſuch depoſitions, and the evidence given in court. And for the ſame reaſon it ſeems agreed, that where a witneſs at one trial varies from his own evidence at another, in relation to the ſame matter, ſuch variance may alſo be given in evidence to invalidate his teſtimony at the ſecond trial. 2 *Haw.* 439.

Which party ſhall conclude.

11. The counſel of that party which doth begin to maintain the iſſue, ought to conclude. *Tr. de Paix.* 220.

A. Subpœna to give evidence.

GEORGE *the third, by the grace of God, of* Great Britain, France, *and* Ireland, *king, defender of the faith, and ſo forth. To* A. B. C. D. *and* E. F. *greeting: We command you, and every of you, that all buſineſs being laid aſide, and all excuſes whatſoever ceaſing, you do in your proper perſons appear before our juſtices aſſigned to keep the peace in our county of* ——— *and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in the ſaid county committed, at the general quarter ſeſſions of the peace, to be holden at* ——— *in and for the ſaid county, on* ——— *the* ——— *day of* ——— *at the hour of ten in the forenoon of the ſame day, to teſtify the truth, and give evidence in behalf of the inhabitants of the pariſh of* ——— *in the ſaid county, againſt* A. O. *in a caſe of baſtardy. And this you are in no wiſe to omit, nor any of you to omit, on pain of one hundred pounds. Witneſs Sir* James Lowther, *baronet, the* ——— *day of* ——— *in the* ——— *year of our reign.*

C.

Note; There may be four witneſſes put in one *ſubpœna*.

* A ſubpœna ticket. *555

To Mr. A. W.

BY *virtue of his majeſty's writ of ſubpœna to you directed, and herewith ſhewn to you, you are perſonally to be before his majeſty's juſtices of the peace for the county of* ——— *at the general quarter ſeſſions of the peace to be holden for the ſaid county at* ——— *in the ſaid county, on* ——— *the* ——— *day of* ——— *next, to teſtify the truth, and give evidence on behalf of the inhabitants of the pariſh of* ——— *in the ſaid county, againſt* A. O. *in a caſe of a baſtardy.*

And

And this you are not to omit, upon pain of one hundred pounds. Dated this ——— day of ——— in the year ———

By the court,

C.

B. Condition of a recognizance to appear and give evidence.

THE *condition of this recognizance is ſuch, that if the above bound* A. W. *ſhall perſonally appear at the next general quarter ſeſſions of the peace to be holden at ——— in and for the ſaid county, and then and there give ſuch evidence as he know th, upon a bill of indictment to be exhibited by* A. I. *of ——— yeoman, to the grand jury, againſt* A. O. *late of ——— in the ſaid county, yeoman, for the feloniouſly taking and carrying away ——— the property of ——— and in caſe the ſaid bill be found a true bill, then if the ſaid* A. W. *ſhall then and there give evidence to the jurors that ſhall paſs on the trial of the ſaid* A. O. *upon the ſaid bill of indictment, and not depart thence without leave of the court, then this recognizance to be void, otherwiſe of force.*

EXAMINATION.

IF a felony is committed, and one is brought before a juſtice upon ſuſpicion thereof, and the juſtice finds upon examination that the priſoner is not guilty; yet the juſtice ſhall not diſcharge him, but he muſt either be bailed or committed: for it is not fit
*556 that a man once * arreſted and charged with felony, or ſuſpicion thereof, ſhould be delivered upon any man's diſcretion, without farther trial. *Dalt. c.* 164.

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In order to which bail or commitment, the examination and information of the parties must first be taken, according to the following statutes:

"Two or more justices (1 Q.) or one of the said justices, before "they bail a person apprehended for felony (if the offence is bailable) shall take his examination (*A*) and the information (*B*) of "them that bring him, of the fact and circumstances thereof, and "the same, or as much thereof as shall be material to prove the "felony, shall put in writing; which examination they shall certify (together with the bailment) at the next general gaol delivery, to be holden within the limits of their commission." 1 & 2 P. & M. c. 13. s. 4.

"And they shall have power to bind by recognizance (*C*) all such "as do declare any thing material to prove the offence, to appear "at the next general gaol delivery, to be holden within the county where the trial shall be, then and there give evidence against "the party; and shall certify such recognizance in like manner." s. 5.

"And if they offend in any thing herein, they shall be fined by "the justices of gaol delivery." *id.*

"In like manner, where the person is not bailed, but committed "to ward, the justice or justices who commit him, shall before "such commitment, take the like examination and information, "and shall put the same in writing within two days after the said "examination, and shall in like manner bind over the witnesses; "and certify the whole as above. 2 & 3 P. & M. c. 10.

Shall take his examination] And in order thereunto, if by some reasonable occasion, the justice cannot at the return of the warrant take the examination, he may by word of mouth command the constable or any other person to detain in custody the prisoner till the next day, and then to bring him before the justice, for farther examination. And this detainer is justifiable by the constable or any other person, without shewing the particular cause for which he was to be examined, or any warrant in writing. 1 H. H. 585.

But the time of the detainer must be no longer than is necessary for such purpose; for which it is said, that the space of three days is a reasonable time. 2 *Haw.* 119.

The examination of the person accused, ought not to be upon oath. 1 H. H. 585.

* But if upon his examination he shall confess the matter, it shall not be amiss that he subscribe his name or mark to it. Dalt. c. 164. *557

Which examination being voluntary, and sworn by the justice or his clerk to be truly taken, may be given in evidence against the party confessing, but not against others. 1 H. H. 585. 2 Haw. 429.

Information of them that bring him] Or of other witneſſes, whom the juſtice may bring before him by his warrant (D) for that purpoſe. 1 H. H. 586. Dalt. c. 164.

And this information muſt be upon oath. Dalt. c. 164. 1 H. H. 586.

And therefore if a quaker is witneſs, his affirmation muſt not be taken in this caſe; for by the 7 & 8 W. c. 34. ſ. 36. it is provided, that no quaker ſhall be examined for or againſt any perſon in any criminal cauſe, unleſs it be upon oath.

And the ſaid information being upon the trial ſworn to be truly taken, by the juſtice or his clerk, may be given in evidence againſt the priſoner, if the witneſſes be dead or not able to travel. 1 H. H. 586.

Or as much thereof as ſhall be material to prove the felony] Yet it ſeemeth alſo juſt and right that the juſtices who take information againſt a felon, or perſon ſuſpected of felony, ſhould take and certify as well ſuch information, proof, and evidence, as goeth to the acquittal or clearing of the priſoner, as ſuch as maketh againſt the priſoner: for ſuch information, evidence, or proof ſo taken, is only to inform the king and his juſtices of the truth of the matter. Dalt. c. 165.

Shall certify at the next gaol delivery] And yet for petty larcenies, and ſmall felonies, the offenders may be tried at the quarter ſeſſions, and the examinations and informations may be certified thither. Dalt. c. 164.

To be holden within the limits of their commiſſion] And yet examinations taken by juſtices of the peace in one county, may be by them certified in another county, and there read, and given in evidence againſt the priſoner. Dalt. c. 164.

To bind by recognizance] And upon refuſal may commit the perſon refuſing. 1 H. H. 586.

And the parties grieved ought to be bound, not only to give evidence, but alſo to prefer a bill of indictment againſt the priſoner. Dalt c. 164.

* A. Examination of a felon. *558

Weſtmorland. THE *examination of* A. O. *of* ——— *yeoman, taken before me* Henry Chaytor, *doctor of laws, one of his majeſty's juſtices of the peace for the ſaid county* [or, in the caſe of bail,—*taken before us* ——— *two of his majeſty's juſtices of the peace for the ſaid county, and one of us of the* quorum] *the* ——— *day of* ——— *in the* ——— *year of the reign of* ———

The ſaid A. O. *being charged before me* [or, *us*] *by* A. I. *of* ——— *yeoman, with the felonious ſtealing out of the houſe of the ſaid* A. I. *at* ——— *on the* ——— *day of* ——— *the following goods, to wit* ——— *of the value of* ——— *he the ſaid* A. O. *upon his examination now taken before me* [or, *us*] *confeſſeth that* ——— [or, *denieth that* ———] *&c.*

B. Information of a witneſs.

Weſtmorland. THE *information of* A. I. *of* ——— *yeoman, taken upon oath before me* [as before]

C. Recognizance to give evidence.

Weſtmorland. BE *it remembered, that on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— A. I. *of* ——— *in the ſaid county, yeoman, did come before me* Henry Chaytor, *doctor of laws, one of the juſtices of our ſaid lord the king, aſſigned to keep the peace in the ſaid county, and did acknowledge himſelf to owe to our ſaid lord the king ten pounds of lawful money of* Great Britain, *under condition, that if he ſhall perſonally appear before the juſtices of our ſaid lord the king, at the next general quarter ſeſſions of the peace* [or, *gaol delivery*] *to be holden in*

and for the ſaid county, then and there to give evidence in behalf of our ſaid lord the king, againſt A. O. *late of* ——— *who being attached, and ſuſpected of felony, is now committed to the gaol of our ſaid lord the king in the ſaid county, then this recognizance to be void, otherwiſe of force.*

559 Or thus, to prefer a bill of indictment, and give evidence.

Weſtmorland. BE *it remembered, that on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— A. I. *of* ——— *in the ſaid county, yeoman, perſonally came before me* Henry Chaytor, *doctor of laws, one of the juſtices of our ſaid lord the king, aſſigned to keep the peace in the ſaid county, and acknowledged himſelf to owe to our ſaid lord the king, the ſum of* ——— *of good and lawful money of* Great Britain, *to be made and levied of his goods and chattels, lands and tenements, to the uſe of our ſaid lord the king, his heirs and ſucceſſors, if he the ſaid* A. I. *ſhall fail in the condition indorſed.* H. C.

The condition of the within written recognizance is ſuch, that whereas one A. O. *late of* ——— *was this preſent day brought before the juſtice within mentioned by the within bounden* A. I. *and was by him charged with the felonious taking and carrying away* ——— *of the goods of him the ſaid* A. I. *and thereupon was committed by the ſaid juſtices to the common gaol in and for the ſaid county: if therefore he the ſaid* A. I. *ſhall and do at the next general quarter ſeſſions of the peace* [or, *gaol delivery*] *to be holden in and for the ſaid county, prefer or cauſe to be preferred, one bill of indictment of the ſaid felony againſt the ſaid* A. O. *and ſhall then alſo give evidence there concerning the ſame, as well to the jurors, that ſhall then inquire of the ſaid felony, as alſo to them that ſhall paſs upon the trial of the ſaid* A. O. *that then the ſaid recognizance to be void, or elſe to ſtand in full force for the king.*

D. Warrant for a witneſs.

Weſtmorland. } To the conſtable of

WHEREAS *oath hath been made before me* ——— *one of his majeſty's juſtices of the peace in and for the ſaid county, by* A. I. *of* ——— *yeoman, that he the ſaid* A. I. *was lately robbed at* ——— *and that he hath good cauſe to believe that* A. W. *of* ——— *is a material witneſs to prove by whom the ſaid robbery was committed: theſe are therefore to require you to cauſe the ſaid* A. I. *forthwith to come before me, to* * *give ſuch information and evidence as he knoweth concerning the ſaid offence, that ſuch further proceeding may be had therein, as to the law doth appertain. Given under my hand and ſeal at* ——— *in the ſaid county, the* ——— *day of* ——— * 560

Here endeth the FIRST VOLUME.

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